Supreme Court, U.S.
FILED
JAN 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1491

IN THE SUPREME COURT
COURT OF THE UNITED STATES
OF AMERICA

TERM _____

KEITH MILTON RHINEHART,
a single person;
THE AQUARIAN FOUNDATION,
a Washington not-for-profit Corporation;
KATHI BAILEY, a married person;
LILLIAN YOUNG, a married person;
TONI STRAUCH, a married person; and
ILSE TAYLOR, representing women who
were members of the Aquarian Foundation
on or after March 17, 1978;

Appellants,

v.

THE SEATTLE TIMES,
a Deleware Corporation,
d/b/a The Seattle Times;
WALLA WALLA UNION-BULLETIN, INC.;
ERIK LACITIS and JANE DOE LACITIS;
JOHN WILSON and REBECCA KAREN WILSON;
JOHN McCOY and KAREN McCOY;

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
WASHINGTON

JURISDICTIONAL STATEMENT

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30 pp

QUESTIONS PRESENTED

I. Did the State Trial Court violate Religion's First Amendment Rights to freedom of association and religion (as protected by the 14th Amendment) by dismissing defamation lawsuit when Religion failed to produce membership lists, ordered in discovery?

II. Did the State Trial Court violate Religion's First Amendment Rights to freedom of association and religion, by dismissing defamation lawsuit when Religion failed to produce videotapes of members, ordered in discovery, but not protected by a protective order although good cause for protection had previously been found by the court?

III. Did State Appellate Court violate Religion's right to due process and equal protection by applying RCW 4.84.185 in a manner to impose penalties for a "frivolous" appeal without providing clear criteria for when such penalties would be imposed, without imposing the same penalties against other similarly situated litigants and without considering that the only avenue to present the above Constitutional issues to the U.S. Supreme Court is to proceed through State Court even if the State Court is not likely to uphold the appeal?

PARTIES TO THE PROCEEDING

All parties to the proceeding are included in the caption. The Attorney General of the State of Washington is also receiving notice of this matter.

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Cert den. of ISSUE I herein, U.S. Supreme Court docket #82-1758.

GROUNDS FOR JURISDICTION

Plaintiffs/Appellants sued the Seattle Times et al for defamation and other causes. The trial court dismissed the action when Plaintiffs failed to produce membership lists and sacred videotapes as ordered in discovery (Appendix A). The appeal was filed in State of Washington Court of Appeals. The Court of Appeals affirmed the trial court by decision reported at 51 Wn. App. 561 (May, 1988) [Appendix E]. A motion of reconsideration was denied [Appendix F], and the State Supreme Court denied a petition for review on November 29, 1988 [Appendix G].

Jurisdiction is conferred in this court by 28 USC 2101 [C], and 28 USC 1257.

PROVISIONS AND STATUTES INVOLVED IN APPEAL

United States Constitution--

Amendment 1	-Appendix G
Amendment 14	-Appendix G
RCW 4.84.185	-Appendix H

THE FACTS

This was an action filed in 1980 by the Aquarian Foundation; a Spiritualist Church, its spiritual leader, Reverend Keith Milton Rhinehart, and several representative female members, against the Seattle Times and one of its reporters. The Seattle Times is a daily newspaper in Seattle, Washington. The action alleged Defamation because of a series of articles published by the Seattle Times in which Plaintiffs claimed they were falsely portrayed as a bizarre Jim Jonesian Cult. They alleged that members experienced ostracization and violence as a result of the articles, resulting in loss of members, loss of financial support, and special and general damage to members. Sworn statements regarding the violence and resulting fear were entered in the court record; the trial court found good cause for a protective order to prohibit the newspaper from publishing names and addresses of members and financial information. [Relevant language, Appendix B.]

In an interlocutory appeal, the Washington State Supreme Court upheld the order compelling discovery. The bulk of the interlocutory opinion, however, related to the validity of the protective order, which was also being reviewed. The discussion regarding the discovery order was cryptic and devoid of a detailed discussion of the First

Amendment issues. The relevant portion of the opinion is attached in Appendix D.

Plaintiffs petitioned to this court for review, [Docket No. 82-1758] but review was opposed by the Seattle Times, who argued inter alia that because the case was not terminated in the trial court below, the decision was not ripe for review and would be an improper advisory opinion if accepted for review at that time. Review was not granted.

When the case was remanded, Plaintiffs supplemented their interrogatory answers and made their bookkeeper available for a deposition pursuant to the trial court discovery order. [Relevant portions, Appendix C]. Defendants also moved to compel several videotapes, which action was opposed by Plaintiffs. Plaintiffs asserted the videotapes were sacred and proposed a protective order to allow viewing of the tapes by Defendants. The trial court refused to grant any protective order, although the video tapes also depicted members.

On January 5, 1987, the trial court entered 2 orders of dismissal--one for failure to produce membership lists, and one for failure to produce the videotapes.

Plaintiffs appealed, and the Washington State Court of Appeals denied the appeal, and found the appeal frivolous, remanding the case to the trial judge for imposition of "reasonable" attorneys fees pursuant to RCW 4.84.185.[1]

Plaintiffs moved for reconsideration and reversal of the finding of frivolous; this motion was denied. [Appendix F].

Plaintiffs moved for review by the State Supreme Court, and the Petition for Review was denied by Order dated November 29, 1988. [Appendix G].

QUESTIONS TIMELY RAISED ON APPEAL

Issue 1 was raised in the trial court by written objection. It was raised by interlocutory appeal and resulted in the State Supreme Court's ruling in relevant portions-- Appendix D

Issue 2 was raised in response to Defense Motion to compel discovery, and timely appealed as reflected in The State Appellate Court ruling, Appendix E.

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[1]On January 9, 1989, the trial court summarily ordered $64,752.02 in fees against Plaintiffs. The trial court denied a request for a stay pending this appeal, a continuance in order to obtain discovery, a jury trial, and any type of evidentiary hearing. The fee amount was also alleged excessive--Times attorneys had published a claim for fees of "more than $38,000.00" when fees were awarded, but by the time fees were formally applied for in court, the amount had swelled by over $24,000.00. King County Cause No. 80-2-02460-4, no appellate court number assigned to date.

Issue 3 was raised promptly after the finding of frivolous in the Appeal Court's decision [Appendix E], both in a motion for Reconsideration [denied, Appendix F], and a Petition for Review to Washington State Supreme Court, [denied, Appendix G].

ISSUE I

DID THE STATE TRIAL COURT VIOLATE RELIGION'S FIRST AMENDMENT RIGHTS TO FREEDOM OF ASSOCIATION AND RELIGION [AS PROTECTED BY THE 14TH AMENDMENT] BY DISMISSING DEFAMATION LAWSUIT WHEN RELIGION FAILED TO PRODUCE MEMBERSHIP LISTS, ORDERED IN DISCOVERY?

This issue raises a critical constitutional question that should be reviewed by the United States Supreme Court because:

A. The State Court found against the protection of Aquarian Foundation's constitutional rights and the U.S. Supreme Court is the court of last resort.

The First Amendment Constitutional right, enforced as to the States through the 14th Amendment Due Process clause, to Freedom of Association is protected form intrusion. One such intrusion protected from is identification of members of groups holding minoritorian belief. See Gitlow v. New York, 268 U.S. 652, 666 45 S. Ct. 625, 629, 69 L.Ed. 1138; Palko v. Connecticut, 302 U.S. 319, 324, 58 S. Ct. 149, 151, 82 L.Ed. 288; Cantell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213; Staub v. City of Baxley, 355 U.S. 313, 321, 78 S.Ct. 277, 281, 2 L.Ed.2d 302.

The decision on interlocutory appeal in this matter held that the trial court could order that membership lists by produced subject to a protective order keeping member identities confidential during discovery.

[Relevant parts, Appendix D]. On appeal from dismissal of the case after Aquarian Foundation failed to produce the membership lists, the Washington Court reiterated its position ordering disclosure of the membership lists. [Appendix E]. In neither opinion did the court address the issue of how the State intrusion into the Aquarian Foundation members' right to freedom of association could be so compelling that it outweighed the Constitutionally protected rights. Not one shred of evidence of record was presented by defendants Times, et al, to justify the need for membership lists and not one iota of evidence was presented by the Times, et al, that any alternative attempts at discovery had been attempted. Instead, the Times relied on the unequivocable demand for membership lists, with the obvious goal of obtaining dismissal of the defamation action against it. It did not even bother to depose the bookkeeper, depose the numerous officers and officials identified to it, or review the extensive financial source documents offered to be available at the bookkeeper's deposition.

Rather than require the Times, et al, to seek alternative sources of discovery, or to demonstrate prejudice by lack of the membership lists, the trial court opened that it would not require that the parties "jump through hoops". The case was summarily dismissed. This ruling is constitutionally repugnant. Review of this ruling is, therefore, appropriate because the State Court has ruled on a federal right, denying the validity of that right. 28 USC. 1257.

B. Review is appropriate because the State Court decision conflicts with the decisions of highest courts of several jurisdictions, including the most closely analogous U.S. Supreme Court Case, NAACP v. Alabama, 357 U.S. 449, 78 S. Ct. 1163 [1958].

NAACP was a case where the State of Alabama sued the organization, purportedly to exact compliance with a state qualification statute. Contempt penalties of $100,000.00 were assessed against NAACP for failing to produce lists of rank and file members, NAACP was foreclosed from having the merits of the action determined. This court held that,

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved."
>
> "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." 357 U.S. at 462.

Both in NAACP and the instant case, Petitioners demonstrated that rank and file members had been subjected to harassment and violence. Indeed, Aquarian Foundation attributes this harassment to the Times, et al, and its false and defamatory publicity.

The court in NAACP rejected the argument that private community pressures, and not the State, may directly cause the harassment; rather, that State action via the judicial system has created the opportunity for private action is sufficient state action to give rise to the Constitutional protection. 357 S.Ct. at 462. In this case, Aquarian Foundation objected to its rank and file members being disclosed to a hostile press, waiting with baited breath to "publish all", if not during discovery then

discovery then during trial in the matter. The potential harm is thus greater to Aquarian Foundation than it was to the NAACP, where although the membership lists were to reach the public record, they were not to reach the files of a daily newspaper waiting to present the identity of members to every person in Seattle via the morning paper.

As in NAACP, Aquarian Foundation did not object to disclosing identity of members who hold official positions. The objection was to the rank and file members being subjected to disclosure.

As in NAACP, Times, et al. justifies its need for membership lists to discover the exact nature of the activities of Aquarian Foundation. As in NAACP, Aquarian Foundation has produced varied business records, its charter and by-laws, names of directors and officials, total number of members, and total income, in addition to extensive financial and other data requested in discovery.

Under NAACP, the interest that must be shown to obtain disclosure is a "compelling State Interest." Id. at 462. Yet, the Times, et al, never showed a compelling interest, never demonstrated prejudice, never showed the attempt to obtain discovery by alternative means.

The State Court's failure to apply NAACP to this case constitutes a violation of Aquarian Foundation's constitutional rights.

C. Other jurisdictions have held, similarly to NAACP, that compelling disclosure of Church members and donors is unconstitutional. See Surinach v. Presquera de Pusquets 604 F.2d 73 [1st Ar. 1979], Church of Hadeem, Inc. v. Supreme Court, 110 Cal. App. 384, 168 Cal.Rptr. 13 [1980].

These authorities specifically dealt with situations where the issue was disclosure in pretrial discovery in a civil case. See also, Britt v. Superior Court 20 Cal.App. 384, 168 Cal.Rptr. 695 [1978].

Eilers v. Palmer 575 F.Supp. 1259 [Minn. 1984] upheld the right of minoritarian religion membership lists to be withheld from civil discovery. In that case, the trial court had entered a protective order but the appellate court never the less ruled that compelling disclosure would genuinely interfere with protected interests.

Emphatically the State Court in this matter has ignored both the methodology--the search for compelling state interest--and the the result of these significant precedents, and therefore its decision must be reviewed.

D. This decision also conflicts with the rationale in the case law outside Washington State, where there are a few narrow exceptions ordering membership lists. In those cases, lists are ordered only where violence is advocated or where the Constitutional freedom is waived.

While the above cases set forth the rule regarding the constitutionally protected status of membership lists, there are very narrow exceptions to the rule, none of which are relevant herein. The narrow exceptions fall within the "compelling state interest" criteria. A compelling state interest requires a very high standard of proof. The chilling effect of membership disclosure is built into the purposes for which disclosure has been found legitimate. These purposes are historically, to deter the activities of organizations that advocate violence or unlawfulness. Familias Unidas v. Brisco, 544 F.2nd 182 [5th Cir. 1976]. See People of the State of New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63, 49 Sct. 61, 73 L.Ed. 184, [Compelling lists upheld for Ku Klux Klan, which organization's activities included unlawful intimidation and violence].

Aquarian Foundation is a Spiritualist Church and the only violence of record is the harassment of members, subsequent to the yellow journalism of the Times, et al.

If a group has never advocated an unlawful purpose, disclosure of members is repugnant to the constitution. Familias Unidas, 619 F.2nd 182. A person may be a member of a group for a number of complex motivations, and disclosure is not tolerated for those not anticipating proscribed conduct. Id. Thus, in this case, rank and file members who joined the Aquarian Foundation to practice the religion of their choice do not fit into the very narrow criteria that would compel disclosure.

Moreover, rank and file Aquarian Foundation members never waived their privilege to Freedom of Association. That is a Constitutional right personal to them, which cannot be waived by Aquarian Foundation. Church of Hakeem. Supra.

E. The U.S. Supreme Court should review this compelling and substantial issue of minoritarian Religious associational rights. The Aquarian Foundation can obtain no relief in State Court without sacrificing the rights of its rank and file members. In this case, Aquarian Foundation sought to stop a hyped-up attack by the press on its very existence as a Church, only to learn in court that its existence was again challenged because in order to obtain relief in court it was ordered to surrender its rank and file membership list.

The facts of this case demonstrate how the alleged aggressor, Times, et al, was able to obtain dismissal of the lawsuit without ever engaging in good faith discovery.

The State Court not only failed to reach the result in the above cases, but also failed to apply the criteria therein. In ordering the membership lists, the State Court also failed to utilize the least

restrictive means of achieving the information on the alleged damages and activities of the Aquarian Foundation.

The record is devoid of any showing by the Times, et al that there was prejudice to the defense in not obtaining a membership list. Even if the list were critical, disclosure should be compelled only after exhausting every reasonable alternative source of information. UAW v. National Right to Work Legal Defense & Educational Foundation 590 F.2d 1139 [DC Cir. 1979]. See Carry v. Hume, 492 F.2d 631 [D.C. Cir.].Cert. dismissed, 417 U.S. 938, 94 Sct. 2654, 41 L.Ed. 2d 661 [1974], where as many as 60 depositions was considered a reasonable prerequisite to compelled disclosure.

If review is not granted in this case, the denial of review will be tantamount to a blue print for parties who wish to defame, harass, and destroy minoritarian organizations. These parties can avoid answering for their defamatory statements by responding to any lawsuit by demanding membership lists. The minoritarian organization then is subject to destruction if the defamation continues, or if the chilling effect of disclosure is imposed. In this way, the Defendants can avoid ever trying the merits of the case and can obtain dismissal of the case.

The freedom of associational concept will this be denied to Religions such as the Aquarian Foundation.

There is no U.S. Supreme Court decision specifically determining the issue herein, but it is a critical Constitutional issue that fundamentally impacts the associational rights of persons who choose to join organizations that hold minoritarian or unpopular views or beliefs, but do not advocate violence.

ISSUE II

DID THE STATE TRIAL COURT VIOLATE RELIGION'S FIRST AMENDMENT RIGHTS TO FREEDOM OF ASSOCIATION AND RELIGION, BY DISMISSING DEFAMATION LAWSUIT WHEN RELIGION FAILED TO PRODUCE VIDEOTAPES OF MEMBERS, ORDERED IN DISCOVERY, BUT NOT PROTECTED BY A PROTECTIVE ORDER ALTHOUGH, GOOD CAUSE FOR PROTECTION HAD PREVIOUSLY BEEN FOUND BY THE COURT?

The above arguments, pertaining to ISSUE I, also apply to ISSUE II regarding the videotapes that were compelled in discovery, in that the videotapes also depicted the countenances of members.

There are several additional reasons why review of dismissal as to the videotapes should be granted.

A. There was no protective order entered to limit usage of the videotapes.

The only protective order in this matter pertained to "names and addresses of members" and to financial information. [Appendix B] It did not pertain to the "identity" of the members, as the State Court incorrectly held in its 1988 decision. [Appendix E] Hence, production of the videotapes could have resulted in the Times, et al, immediately publishing or releasing the tapes for public airing. This would have undermined the effect of the protective order, and would have subjected the tapes, consecrated as sacred by the Church, to disclosure in a hostile, secular setting.

The State Court begged the question presented by the videotape issue, first by calling the sacredness of the tapes "questionable". This paternalistic evaluation of the religious beliefs of the Aquarian Foundation directly conflicts with the criteria to be used when evaluating the constitutionality of intrusion into a religious practice. The general rule is, as long as a belief is sincerely held, then the court must not inquire into the believability of a belief that is religious in nature.

> It is inappropriate for a reviewing court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity, and the founders did not intend for them to be declarants of religious orthodoxy.

Africa v. Pennsylvania, 662 F.2d. 1025,
Citing U.S. v. Ballard 322 U.S. 78.

As a consequence of the State Court's failure to seriously consider the Aquarian Foundation's right to prevent the violation of sacred objects in that Religion, the issues of free association and free exercise were avoided.

B. The State Court articulated a spurious First Amendment news interest in finding that the proposed protective order was not appropriate.

The State Court mouthed contradictory holdings in order to create a fictional first amendment interest of the media Defendants.

In this case, recall that the trial court has previously found good cause to protect members' names and addresses in its first protective order. On interlocutory appeal, the State Court held:

> "The more extensive protection which [the Plaintiffs] desire is within the discretion of the trial court in a proper case, but the Plaintiffs are not entitled to such an order as a matter of right." See Rhinehart, Appendix cited at 232.

Therefore, the protective order proposed by Plaintiffs could have been entered.

On the very same page, the State Court disregarded its own holding, by stating:

> Thus had the Appellants sought such a protective order [presumably an order protecting only members' identities] as to the compelled discovery of the films and videotape, it could not have been attacked on these First Amendment grounds. Instead, the Appellants sought a protective order which would have imposed other restrictions and conditions. Id.

Nowhere is there a First Amendment challenge to the protective order proposed by Plaintiffs as to the videotapes. This nonsensical State Court paragraph rejecting the Plaintiffs' proposed protective order also fails to further analyze the fabricated First Amendment grounds that purportedly were a basis for its decision.

In fact, the trial court had found good cause for protection. In fact, Aquarian Foundation had not refused to produce the tapes; but proposed a protective order which would allow for discovery in the least restrictive manner. Defendants Times, et al did not show any reason why their discovery needs would not be fulfilled by that protective order, and failed to propose any other protective order.

Because the order proposed was within the discretion of the trial court, because it proposed the least obtrusive means, and because no other proposed protective orders were before the court, the trial court violated Plaintiffs' First Amendment rights in failing to enter the requested protective order.

The reasons for accepting review are magnified by the State Court's intrusion into the right of Aquarian Foundation to assert and have its religious objects free from hostile violation; and its total failure to apply any protective order to the videotapes, in spite of its earlier "good cause" finding.

ISSUE III

DID STATE APPELLATE COURT VIOLATE RELIGION'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION BY APPLYING RCW 4.84.185 IN A MANNER TO IMPOSE PENALTIES FOR A "FRIVOLOUS" APPEAL WITHOUT PROVIDING CLEAR CRITERIA FOR WHEN SUCH PENALTIES WOULD BE IMPOSED, WITHOUT IMPOSING THE SAME PENALTIES AGAINST OTHER SIMILARLY SITUATED LITIGANTS AND WITHOUT CONSIDERING THAT THE ONLY AVENUE TO PRESENT THE ABOVE CONSTITUTIONAL ISSUES TO THE U.S. SUPREME COURT IS TO PROCEED THROUGH STATE COURT EVEN IF THE STATE COURT IS NOT LIKELY TO UPHOLD THE APPEAL.

RCW 4.84.185, set forth in Appendix H in relevant part, allows the State Court to impose reasonable attorneys fees and costs against parties who bring frivolous actions or appeals. In this case, the trial court did not find the defamation action frivolous, but the appellate court awarded fees and costs for a "frivolous" appeal. The Statute in no sense defines the term "frivolous". The trial court imposed approximately $65,000.00 upon remand.

A. This court should review RCW 4.84.185 as enforced by State Court because it violates the right to due process in imposing fees and costs without notice.

Imposition of fees and costs--essentially a penalty for having utilized court processes--is triggered if the action or proceeding is "frivolous". As enforced, this statute fails the tests for complying with the due process clause.

Washington courts have adopted correct criteria regarding the due process clause of the Fourteenth Amendment, which requires that a statute or rule give fair notice of what is prohibited or required. Gibson v. City of Auburn, 50 W.App. 561, 748 P.2d 673, 676 [1988], citing; State v. Reader's Digest Association, Inc., 501 P.2d 290, 300, 81 W.2d 259 [1972]. If a statute fails to give fair warning as to what is prohibited, it is subject to a vagueness or indefiniteness challenge. Id. at 300. In order to withstand a vagueness challenge, a statute must have two components: "[1] it must give adequate notice of prohibited conduct so that a person of ordinary intelligence would not have to guess at its meaning, and [2] it must have adequate standards to prevent arbitrary enforcement." State v. Markham, 697

P.2d 263, 40 Wash.App. 75 [1985]; citing, State v. Maciolek, 101 W.2d 259, 264-64, 676 P.2d 996 [1984].

The first component that must be met in order to withstand a vagueness challenge has been identified as the "common intelligence" test. In order for a statute to be found to give fair warning under the common intelligence test, the statute must meet the "common intelligence" test. Under this test, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." State v. Reader's Digest Association, Inc., 81 W.2d 259, 300, 501 P.2d 290 [1972]; Gibson v. City of Auburn, 18 P.2d 673 [1988].

RCW 4.84.125 fails to withstand the two pronged vagueness challenge. The statute fails to meet the first prong, the "common intelligence" test because the terms of the statute are so vague as to require that persons of common intelligence guess at the meaning of the statute.

The language that causes the constitutional violation in the present case stems from the requirement that reasonable expenses are incurred in defending an action deemed "frivolous".

In addition to failing to meet the first prong of the vagueness test, 4.84.185 also fails to meet the second prong of the test. The second prong requires that a statute have adequate standards to prevent arbitrary enforcement. Because the statute does not provide adequate standards to prevent arbitrary enforcement, such as finding Aquarian Foundation's appeal "frivolous", the statute again violates the Fourteenth Amendment. In this case, standards for the key term "frivolous", is insufficient to prevent arbitrary enforcement. The result herein is instructive: the Court found this appeal to be purportedly, so frivolous that it not only lacked merit, but that reasonable minds could not differ as to its frivolity. This would be an open and shut case. Meritless on the face of it. By definition it would be subject to no reasonable argument in its support. Yet the Court on remand awarded, in the face of this finding, approximately $65,000.00 in fees, finding it "reasonable" that purportedly competent counsel would spend approximately 650 hours to respond to the "frivolous" arguments on appeal. This is arbitrary, capricious, preposterous, and impossible in any system of logic or jurisprudence.

The only result of this case is to set up an arbitrary precedent that will create a chilling effect to prevent particularly unpopular groups and litigation issues from litigating.

1. "Frivolity" is an ill-defined concept in Washington state case law.

The word "frivolous" is dictionary-defined as:

> "void of significance or reason; petty trivial. Characterized by lack of seriousness, sense, or reverence. Trifling, silly." The Practical Standard Dictionary of the English Language Funk and Wagnall's Company [1927]

In Washington State, Standards for frivolity are established only on a rudimentary conceptual basis. There is no body of caselaw, however, that will set forth the philosophical basis for the standards: to the contrary, there is no evolution of reasoned thought to justify why and how Washington's frivolity standards exist. There is also very little caselaw applying specific facts to the rudimentary concepts that exist.

Rudimentary concepts of frivolity are vague because they are based upon predicting the success of litigation.

A case is frivolous when the court is convinced that it presents no debatable issues upon which reasonable minds might differ and it is so devoid of merit that there is no reasonable possibility of reversal. Griffen v. Draper, 32 W.A. 611, 649 P.2d 123 [1982]; Del Guzzi Construction Co. v. Global N.W., 105 W.2d 878, 719 P.2d 120 [1968].

A case dismissed because the arguments are rejected is not frivolous. Halvorson v. Fergeson, 46 W.A. 708, 735 P.2d [1987].

2. Washington case law is inconsistent with the rule of professional conduct 2.3.

No mention of RPC 2.3 as made in the Washington caselaw regarding the concept of frivolity. RPC 2.3 governs conduct of all attorneys in Washington State and provides that an attorney has not taken a frivolous position if there is a "good faith argument for an extension, modification, or reversal of existing law." A lawyer has a duty to advocate vigorously for the client.

The Washington courts, by basing the frivolity standard on the probable success of litigation, precludes the good faith argument for extension, modification, or reversal of a legal concept. This body of decisional law threatens to remake the attorney-client relationship so that a lawyer will be shackled when making good faith arguments for the client.

The lawyer runs the risk of causing the court to penalize the client, if unpopular views are argued. The lawyer therefore becomes a slave to the conformity of stare decisis instead of the advocate that the client has a right to, and for which the legal system is designed. This creates a conflict in the very basis of the lawyer's role, and the obligation of

undivided loyalty to the client's legitimate interests. The Washington lawyer cannot predict the parameters of his or her duty.

3. Frivolity is a vague, undeveloped concept.

Not only does the decision fail to be based on a clear criteria presented in Washington Law, and a conflict with lawyers' professional conduct rules, it imposes terms which punish litigants for a legitimate use of the court system. It substantially changes the traditional application of the term "frivolous" to litigation.

The concept of frivolity was traditionally reserved for the patently absurd. It does not apply to the unpopular, the rejected theory, or the erroneous proposition. Free flow of ideas in the legal market place is safeguarded through many sources including the First Amendment of the U.S. Constitution regarding freedom of speech and adopted as to the States via the Fourteenth Amendment. A nation wide state and federal computer search of the frivolous action criteria nets 40% of both state and federal cases occurring in the past 10 years. Along with the increasing number of cases have come a hodge-podge of somewhat unscientific criteria as to what is "frivolity".

Those cases setting forth factual examples of frivolity hearken to truly baseless claims--i.e.: A motion to change venue when the forum was the residence of both parties and of the occurrence of the acts underlying the action Hauck v. Trania Auston Homes, 467 S.2d 707 [Fla.App. 5 Dist. 1985]. An obvious failure to prosecute an appeal, and failure to address any issues whatsoever. McAnnally v. Levco, 456 So. 2d 66 [Ala. 1984].

In Washington State, frivolity is defined in principle by Streator v. White, 26 W.App. 430, 613 P.2d 187 [1980].

> [1] A civil appellant under RAP 2.2; [2] all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; [3] the record should be considered as a whole; [4] an appeal that is affirmed simply because the arguments are rejected is not frivolous; [5] an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Factually, in Streator, however, the real issue was that the appeal was based on a challenge to findings of fact and not to legal principles. Therefore, by definition the appeal on its face was frivolous.

In this case, Aquarian Foundation directly challenges legal principles of Constitutional magnitude and sets forth logical arguments for extension or reversal of legal principles. Therefore, the concept of frivolity is vague and past caselaw gives no notice that Aquarian Foundation's appeal would be found frivolous.

4. "Frivolity" has not been previously reviewed by this court, yet this case presents a new development in this arena that will chill access to the courts.

Other courts have different standards of frivolity which are more amenable to modifying existing law. For example, in Oklahoma, the test for determining if an action is frivolous or without merit is whether Plaintiff cannot make rational argument on the law or facts in support of his claim. Davis v. Oklahoma Department of Correction, 516 F.Supp. 5. New York has taken the position that attorneys and litigants should not be inhibited from pressing novel issues or in setting forth a position that can be supported by good faith argument for extension, modification, or reversal of existing law. Code of Prof. Resp., DR7-102 [A] [1]; Ltown Ltd Partnership v. Sire Plan, Inc., 489 NYS 2d 567, 108 A.D. 2d 435.

Likewise, the comment to ABA Model R 301 asserts that an advocate has a duty to use legal proceedings for the fullest benefit of the client's cause, and that in determining the appropriate scope of advocacy, one must take account of the law's ambiguities and potential for change. ABA Model R.3.1. The comment further states that the filing of an action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. Id. An action, according to the ABA, is only frivolous if the client desires to have the action brought mainly for the purpose of harassing or maliciously injuring the opponent, which is not the case here, or if the lawyer is unable to either make a good faith argument on the merits or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. ABA R Model 3.1.

Similarly, California views an appeal as frivolous only when it is prosecuted for delay or when it indisputedly has no merit. Berger v. Godden, 210 Cal. Rptr. 109, 163 C.A. 3d 1113 [1985]. North Dakota holds that, though appeals must have some legitimate basis in fact and law, appeals must by necessity test the validity of established legal principles and seek the adoption of new legal propositions. Mitchell v. Preusse, 355 N.W. 2d 511 [1984].

Federal law likewise presents a traditional view of frivolity that tolerates the unsuccessful litigant. For example, in Velson v. Predmont Aviation, Inc., 750 F.2d 2.34 [1984], the court viewed an Appellant's attempt to extend the breadth of a law as not frivolous in a case of first impression.

In general, "frivolity" as traditionally defined, is emphatically not the same as meritless. In Re Marriage of Flaherty, 31 Cal.3d 637, 650, 183 Cal Rptr. 508, 516, 1517, 646 P.12d 179, 187-188. See also, Ltown Lmtd. Partnership v. Sire Plan, Inc., 489 N.Y.S. 2d 567 at 574, 108 A.D. 2d 245 at 442 [1985]. Furthermore, traditionally, "all doubts as to whether an appeal is frivolous should be resolved in favor of the Appellant." In Re Estate of Pesterdoff, 37 Washington App. 418 at 424, 680 P.2d 1062 at 1066; See also, Breshears v. Malan Oil Co., 671 S.W. 2d 40 at 404 [Mo. App.]. Significantly courts outside of Washington State hold that sanctions should not be imposed except in the "clearest cases" Ltown Ltd., supra at 574; Corona v. Lundgran, 158 Cal.App. 2d 764, 768, 204 Cal.Rptr. 846 at 849.

As to the interpretation of the "clearest cases", Ltown cites frivolity by any standard, such that there can be "no tenable claim that the issues tendered are, in any sense, arguable or that the case presents some reason to modify established decisional law." Id.

Such is the standard of frivolity espoused by other jurisdictions - where there is absolutely no basis in fact or law for bringing an action.

Federal law further supports Appellants view of the lack of standards in the Washington Court in its finding of "frivolity". For instance, in Smithbay v. Hospital Administration, 841 F.2d 751 [1988], the court held that based on 28 USCA 1915 [d], a complaint is frivolous at the preliminary stages of litigation only if the Plaintiff can make no rational argument in law and fact to support his claim for relief. Id. Further, a court should not dismiss a complaint as frivolous unless there is "indisputedly absent any factual as well as legal basis for the asserted wrong." Id. "Frivolity" traditionally embraces truly silly, baseless actions, i.e., in Glick v. Gutbrod, 782 F.2d 754 [1986], the court awarded reasonable attorney fees for defending a frivolous appeal when the losing party unsuccessfully brought an action in federal court to vacate a prior correct state decision in a foreclosure action where the party failed to provide any real legal or factual support for his argument and when he ignored the district court's encouragement for them to seek competent legal counsel. Clearly the court in Glick set a higher threshold of frivolity than the State Court in the present case, one wherein the party neglects to supply any basis for relief or to follow the court's directions.

And in Malone v. Colyer, 710 F.2d 258 [1983], the court held an action to be frivolous only if it appears beyond a doubt that the Plaintiff can prove no set of facts entitling him to relief. Finally, it cannot be said that Appellants have failed to state a claim, or repeatedly litigated already-determined issues or assert allegations that are beyond credibility, all standards which federal courts look to in determining frivolity. See, Anderson v. Conghein, 700 F.2d 37 [1983].

Appellants, as set forth herein, brought highly substantive issues to the State Court for review, supported by legal precedent of constitutional magnitude. Appellants had no prior notice that the State Court would impose tens of thousands of dollars to penalize them for bringing these issues to court. They were put in a position of guessing whether or not they could be penalized. Consequently they were deprived of due process when the State Court summarily made an finding of frivolity in this matter.

Moreover, there are no standards to predict when and whether the State Court will enforce this statute. It can deem unpopular litigants to be "frivolous", or it can virtually deem anyone unsuccessful to be "frivolous". Bringing an action on appeal becomes a game of Russian roulette as to whether or not litigants will be punished for raising issues--particularly issues challenging the status quo.

Therefore, the U.S. Supreme Court must review this issue which is of importance to the very fundamental character of litigants' rights in this State.

B. The trial court's finding of frivolity violated Appellant's 14th Amendment Right to Equal Protection.

1. The 14th Amendment protects the right to be treated equally under the law with similarly situated others.

The Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." The clause guarantees that those similarly situated will be treated similarly. Flowers v. Webb, 575 F.Supp. 1450 [1983]. If a fundamental right is involved, as it is in the present case, the Court must use a strict scrutiny analysis. In order to uphold the dissimilar treatment, the act or event must be necessary to promote a compelling governmental interest.

2. The finding of frivolity treats Appellants, a religion, who have advocated less well established legal principles, and or the extension or modification of those principles to their case, less favorably than other cases based upon colorable arguments, filed by non religious groups.

First, by voicing "frivolity" criteria that is based upon whether or not a claim on appeal is likely to be successful, the State Court is directly discriminating against Appellants who challenge the status quo.

Secondly, the ruling as to the Aquarian Foundation that the appeal is frivolous directly conflicts with how the State Court has treated

other litigants. In Motel Employees Local 8 v. Glen Johnson, 51 Wm.App. 676 [June 1988], the State Court held an appeal not frivolous if appellant can cite other authority in support of his or her position. As cited herein, there is extensive authority for Appellants' position on appeal--in addition; Appellants' appealed the interpretation of the priest-penitent statute that had never before been interpreted by the Appeals Court. Aquarian Foundation's right to access to the courts on the same basis of other more traditional litigants must be protected. The State Court need not embrace their beliefs, but it must not express scorn for their right to hold beliefs of their choice.

Significantly, See, State v. Maxon, 110 W.2d 564 [1988], where the State Court did not find frivolous an appeal attempting to identify a new parent-child privilege there is no such privilege recognized or created by statute in Washington State. Yet, the State Court did not find the Maxon Appellants frivolous. Aquarian Foundation's appeal on this subject was based upon statutory authority, a statute creating a priest-penitent privilege, and presented a position presented in other discussions of this privilege and its scope. The position was the minority position, but it was a valid and arguable position and was not precluded by the statutory language. Nevertheless, the State Court wrongly deemed Aquarian Foundation frivolous.

Review of the State Court's application of the concept of frivolity is doubly critical in that it affords an arbitrary arm to use in penalizing unpopular litigants; in this case, Aquarian Foundation's right to Equal Protection of the law has been violated.

C. Equal protection issue herein is more critical because State Court remedy must be sought prior to brining issues to U.S. Supreme Court.

Even if Aquarian Foundation knew that the Washington State Court was unlikely to reverse certain of its previous rulings, the only avenue to appeal the erroneous State decisions to the U.S. Supreme Court is by first exhausting State remedies. 28 USC 1257, 28 USC 2101.

Therefore, the State Court "frivolity" criteria penalizes the litigant who seeks a federal forum to assert federal rights. The finding of frivolity, therefore, in a case of appealing a Constitutional issue, works to chill the exercise of that right and is repugnant to the 14th Amendment Due Process Right.

This issue has not previously been reviewed by this court and presents a serious Constitutional issue for which review is of moment to countless State Court litigants.

CONCLUSION

The U.S. Supreme Court is presented with three significant issues to review. They are Constitutionally significant and present compelling issues of State intrusion into rights guaranteed by the First and Fourteenth Amendments.

Dated this _____ day of _____, 1989.

_____
Jean Schiedler-Brown
Attorney for Appellant

Supreme Court, U.S.
FILED
JAN 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 88-1491

IN THE SUPREME COURT
COURT OF THE UNITED STATES
OF AMERICA

TERM _____

APPENDICES TO JURISDICTIONAL STATEMENT

KEITH MILTON RHINEHART,
a single person;
THE AQUARIAN FOUNDATION,
a Washington not-for-profit Corporation;
KATHI BAILEY, a married person;
LILLIAN YOUNG, a married person;
TONI STRAUCH, a married person; and
ILSE TAYLOR, representing women who
were members of the Aquarian Foundation
on or after March 17, 1978;

Appellants,

v.

THE SEATTLE TIMES,
a Deleware Corporation,
d/b/a The Seattle Times;
WALLA WALLA UNION-BULLETIN, INC.;
ERIK LACITIS and JANE DOE LACITIS;
JOHN WILSON and REBECCA KAREN WILSON;
JOHN McCOY and KAREN McCOY;

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
WASHINGTON

Counsel for Appellants:
JEAN SCHIEDLER-BROWN
Law Offices of Jean Shiedler-Brown Assoc., PS.
606 Post Ave., Suite 101
Seattle, WA 98104
(206) 223-1888

51pp

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION,a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Plaintiffs,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a/ The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY,

Defendants.

No. 80-2-02460-4

ORDER COMPELLING DISCOVERY OR TO DISMISS

[Clerk's Action Required]

Upon hearing argument by counsel on the Motion of The Seattle Times defendants requesting that plaintiffs' complaint be dismissed with prejudice for failure to comply with the Order Compelling Discovery entered by this court on June 26, 1981, and having reviewed the pleadings and records on file in this case,

IT IS ORDERED that:

1. The Motion of defendants be, and it hereby is, GRANTED, and the complaints of RHINEHART, The AQUARIAN FOUNDATION, and KATHI BAILEY are hereby DISMISSED with prejudice.

DATED this 5th day of December, 1986.

/s/
The Honorable James J. Dore
Superior Court Judge

Presented by:

DAVIS WRIGHT & JONES
Attorneys for Defendants

By /s/
Evan L. Schwab
Bruce E. H. Johnson
Howard Stambor

Approved as to form;
Notice of Presentation Waived:

JEAN SCHIEDLER-BROWN
Attorneys for Plaintiffs

By /s/
Jean Schiedler-Brown

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION,a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Plaintiffs,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a/ The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY,

Defendants.

No. 80-2-02460-4

ORDER COMPELLING DISCOVERY OR TO DISMISS

[Clerk's Action Required]

Upon hearing argument by counsel on the motion of the Seattle Times defendants requesting that plaintiffs be required to produce and permit the inspection and copying by defendants of certain films and videotapes in the possession, custody, or control of the plaintiffs, and plaintiffs having failed to do so pursuant to a request therefore duly served by plaintiff,

IT IS SO ORDERED THAT:

1. The motion of defendants be and it hereby is GRANTED, and that plaintiffs produce and permit defendants to inspect and copy the following fils and videotape:

a. A film made circa 1958 by and/or for NKH-TV, a Japanese television station or network, dealing with scientific testing of the Reverend Rhinehart.

b. A film made circa 1965 by and/or for KTWW-TV, as the first part of a series dealing with the beliefs and principles of the Reverend Rhinehart and/or the Aquarian Foundation.

c. A videotape of the "religious service" conducted before the inmates at the Washington State Penitentiary at Walla Walla, Washington, in 1978 which was made by and/or for the Reverend Rhinehart and/or the Aquarian Foundation.

2. These films and videotapes be produced at the offices of Davis Wright & Jones, 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington 98101-1688, on _____, 1986, at 9:00 a.m.

3. Defendants may withdraw films and videotapes from the possession of plaintiffs for the purpose of having them copied and return them immediately thereafter, or the plaintiffs, at their election, may produce copies for defendants at defendants' expense.

4. If plaintiffs fail to produce the films and videotape on or before December 15, 1986, at 9:00 a.m. (ten days following the entry of this Order), plaintiffs' complaint is DISMISSED with prejudice.

DATED this 5th day of December, 1986.

/s/
The Honorable James J. Dore
Superior Court Judge

Presented by:

DAVIS WRIGHT & JONES
Attorneys for Defendants

By /s/
Evan L. Schwab
Bruce E. H. Johnson
Howard Stambor

Approved as to form;
Notice of Presentation Waived:

Donald B. Kronenberg
Attorneys for Plaintiffs

By /s/
Donald B. Kronenberg

APPENDIX B

1a

APPENDIX A.

In The

SUPERIOR COURT OF THE STATE OF WASHINGTON

For King County

No. S0-2-02460-4

Keith Milton Rhinehart, *et al.*,

Plaintiffs,

vs.

The Seattle Times, *et al.*,

Defendants,

OPINION GRANTING PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

The defendants in this case are engaged in extensive discovery which requires that the plaintiffs disclose a great deal of information which would normally be kept confidential. The Court has ordered disclosure of statements of assets and liabilities, other financial and investment information, names and addresses of persons involved in the Aquarian Foundation and other information which the defendants normally would not receive.

The Court has ordered disclosure of this information pursuant to the provisions of Civil Rule 26(b)(1) which provides as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Those drafting Rule 26 recognized that along with liberal discovery there was a need for protective orders in order to protect a party from abuse or embarrassment and in order to prevent unbridled dissemination of information which a party gained only through the discovery process.

One of the defendants in this case is The Seattle Times, a daily newspaper with a heavy readership in western Washington and which is distributed throughout the entire state.

The Seattle Times asserts that it has a right under the First Amendment of the United States Constitution to print in its newspaper any information it gains through the discovery process in this case. In effect, The Seattle Times argues that Rule 26(c) providing for Protective Orders simply does not apply to a daily newspaper because of its First Amendment rights.

As counsel for the plaintiffs has very ably pointed out, all persons and all legal entities are protected in their freedom of expression by the First Amendment. It applies to everyone, not just newspapers, magazines, radio stations and television stations. Thus there would seem to be no basis for treating a litigant who happens to be a newspaper publisher any different from any other litigant insofar as a litigant's rights under the First Amendment are concerned.

Protective Orders are entered routinely in cases where the party seeking the Protective Order has a reasonable basis for its request that the information gained through discovery be used by the discovering party for no purpose other than the legitimate purposes of the case in which discovery was granted. This means that the information is not disseminated any more than is absolutely necessary for the discovering party to prepare for trial and to try his case.

The plaintiffs here have reasonable grounds for the issuance of such an order in connection with information developed regarding the financial affairs of the various plaintiffs, names and addresses of Aquarian Foundation members and those contributing funds to the Aquarian Foundation and names and addresses of those who have been contributors, clients or made donations to the Aquarian Foundation or the Plaintiff Rhinehart.

Counsel for the defendants has pointed out that a Protective Order cannot apply to information gained by a litigant about his opponent which is not gained through the use of one or more of the discovery vehicles provided by the Civil Rules. This contention is correct. The Protective Order in this case has no application except to information gained by the defendants through the use of the discovery processes.

The intent and purpose of the Protective Order will be that the discovering party make no use of dissemination of the information gained through discovery other than such use as is necessary in order for the discovering party to prepare and try the case. It follows that information gained through the discovery process will not be published by The Seattle Times or made available to any news media for publication or dissemination.

Defendants argue that a Protective Order which has the effect of preventing publication of information gained through discovery in its daily newspaper violates freedom of the press rights guaranteed by the First Amendment. Defendants cite cases in support of their position. The case of *In Re Halkin*, 598 F 2d 176 is a case in point because it involves the use that can be made of information learned through the discovery process. *Halkin* emphasizes the importance of First Amendment

rights and holds that if a Protective Order restricting First Amendment rights is to be entered such an order should be narrow in scope, necessary because of the threatened harm and the lack of any reasonable alternative. *In Re Halkin* holds that the First Amendment applies to discovery materials. In *Halkin* the defendants did not request a Protective Order prior to discovery. The request was made only after the plaintiff [sic] had gained the discovery materials and then announced that it intended to release the information to the press. The Halkin opinion does not deal directly with the question of the relationship between a Protective Order and First Amendment rights.

Provision for a Protective Order was adopted in the first place so that the Court, in the interest of full disclosure and litigation, could order production of information normally kept confidential and then protect against abuse by requiring that the information receive only such dissemination as was necessary in the handling and preparation of the particular case involved.

If Protective Orders are not available, it could have a chilling effect on a party's willingness to bring his case to court. If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights as can result from an impingment upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

Counsel for plaintiffs can present an order consistent with this opinion.

DATED AT SEATTLE, WASHINGTON this 10th day of June, 1981

/s/ Jack P. Schofield
Jack P. Schofield, Judge

APPENDIX B

For King County

No. 80-2-02460-4

Keith Milton Rhinehart, a single person; The Aquarian Foundation, a Washington not-for-profit corporation; Kathi Bailey, a married person, Lillian Young, a married person, Toni Strauch, a married person, Sylvia Corwin, and Ilse Taylor, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Plaintiffs

v.

The Seattle Times, a Delaware corporation, d/b/a The Seattle Times; Walla Walla Union-Bulletin, Inc.; Erik Lacitis and Jane Doe Lacitis; John Wilson and Rebecca Karen Wilson; John McCoy and Karen McCoy,

Defendants.

PROTECTIVE ORDER

THIS MATTER having come on upon the motion of the plaintiffs for a protective order, and the court having reviewed the affidavits of Marilou McIntyre, Linda Dunn, Robert Plante, Gillene Avalos, and Catherine Harold, and the court having considered the positions advanced by plaintiffs with respect to the rights of plaintiffs and members of the Aquarian Foundation to freedom of association and religion and to rights of privacy, and the court having considered that the absence of protective orders would have a chilling effect on a person's willingness to bring a case to court and that this would have the effect of denying persons access to the courts, and the court being fully advised, NOW, THEREFORE, IT IS HEREBY ORDERED,

ADJUDGED, AND DECREED:

1. Plaintiffs have reasonable grounds for the issuance of a protective order.
2. Plaintiffs' motion for a protective order is granted with respect to information gained by the defendants through the use of all of the discovery processes regarding the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs.
3. The defendants and each of them shall make no use of and shall not disseminate the information defined in paragraph 2 which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes.
4. Defendants' motion for a stay is denied.

June 26, 1981

/s/ Jack P. Schofield
Jack P. Schofield, Judge
King County Superior Court

Presented by:

Edwards and Barbieri

By /s/ Malcolm L. Edwards
Malcolm L. Edwards
Attorneys for Plaintiffs

APPENDIX C

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION,a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978, Plaintiffs, v. THE SEATTLE TIMES, a Delaware corporation, d/b/a/ The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY, Defendants.	No. 80-2-02460-4 ORDER COMPELLING DISCOVERY

[Only paragraph 2. of the order is reproduced herein]

2. Interrogatory No. 31 asked plaintiff Rhinehart to disclose the name and address of everyone who has been a member of the Aquarian Foundation at any time in the past ten years. Interrogatory No.27 to the Aquarian Foundation asks the same question. In lieu of answering the interrogatory at this

time, plaintiffs Rhinehart and the Aquarian Foundation must provide defendants with documentary evidence in support of the Aquarian Foundation's supplemental answer to Interrogatory No. 27, and the plaintiffs are ordered to have those portions of the books and records used to make the diminished membership compilation available for examination at the deposition of defendants' counsel. Following the deposition, if defendants feel that they still cannot defend against the claim of diminished membership without obtaining the names and addresses of the Aquarian Foundation members, they may renew their motion to compel plaintiff Rhinehart to answer Interrogatory No. 31 and to compel the Aquarian Foundation to answer Interrogatory No. 27.

APPENDIX D

THE SUPREME COURT OF WASHINGTON

98 Wn.2d 226, 654 P.2d 673

[Nos. 47938-5, 48155-5 En Banc. December 2. 1982]

KEITH MILTON RHINEHART, *et al, Respondents*, v. THE SEATTLE TIMES COMPANY, *et al, Petitioners*.

[1] Discovery--Constitutional Law--Freedom of Press Information Obtained Through Discovery--Protective Order Validity--Factors. CR 26(c), which permits a trial court to forbid publication of information obtained through discovery upon a showing of "good cause", is constitutional. The First Amendment does not give the news media more right to use information obtained during discovery than any other litigant. To determine if "good cause" exists for a protective order, the court must balance the interests served by protecting the confidentiality of the information (e.g., ensuring the full and truthful disclosure of relevant facts and protecting individuals' legitimate privacy interests in avoiding unwanted publicity) against the interests served by allowing publication of the information (e.g., informing the public of matters of legitimate public concern) under the circumstances. The trial court's decision regarding the issuance of a protective order is reviewed for an abuse of correction.

[2] Discovery--Scope--Effect on Constitutional Rights--Protective Order. The scope of discovery is a matter within the trial court's discretion. Any adverse impact which disclosure has on individual privacy and association rights may be minimized by issuance of a protective order CR 26(c). DOLLIVER, J., BRACHTENBACH, C.J., and DIMMICK, J., concur by separate opinion; UTIER and PEARSON, J.J., dissent by separate opinion.

Nature of action: In an action against two newspapers seeking damages for defamation and invasion of privacy, the

plaintiffs refused to disclose certain information requested during discovery.

Superior Court: The Superior Court for King County, No. 80-2-02460-4, Jack P. Scholfield, J., on June 26, 1981, entered an order compelling discovery and a protective order prohibiting the newspapers from publishing the information acquired through discovery.

Supreme Court: Holding that under the circumstances the protective order did not deny the newspapers freedom of speech and was adequate to safeguard the plaintiffs' privacy and associational interests, the court *affirms* the orders.

Davis, Wright, Todd, Riese & Jones, by *Evan L. Schwab* and *Bruce E. H. Johnson*, for petitioners.

Edwards & Barbieri, by *Malcolm L. Edwards* and *Robert G. Sich*, for respondents.

Gordon G. Conger, Robert B. Mitchell, and *Susan D. Jones* on behalf of KIRO, Inc., amici curiae for petitioners.

[As amended by order of the Supreme Court December 13, 1982.]

ROSELLINI, J.--The Seattle Times published stories concerning the Aquarian Foundation and its leader, Rhinehart, who founded the organization in the 1950's. Articles about the foundation, a "spiritualist church", also appeared in the Walla Walla Union-Bulletin, describing some bizarre performances which were presented at a "religious presentation" staged for inmates at the state penitentiary at Walla Walla.

Rhinehart brought this action on behalf of himself and the foundation, seeking damages for defamation and invasion of privacy. He was joined by four members who participated in the Walla Walla presentation.

The defendants denied many of the allegations and asserted affirmative defenses including claims to privilege. They undertook discovery with respect to the plaintiffs financial affairs, membership and donors. This information was relevant upon the issues of truth and damages. It appears that the attorney for the defendants assured counsel for the plaintiffs that financial materials disclosed to him would be kept confidential. The defendants were provided with income tax returns of Rhinehart and some financial information relating to the other plaintiffs. The plaintiffs refused, however, to disclose other desired information, such as the present address of

Rhinehart, who allegedly had fled the state because of threats to his life resulting from the publicity given the foundation by the defendants.

The defendants sought and were granted an order compelling discovery, and the plaintiffs obtained a protective order limiting the use which could be made of information derived through the discovery process. The order provided:

> 3. The defendants and each of them shall make no use of and shall not disseminate the information . . . which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes.

Clerk's Papers, at 26.

The plaintiffs objected to the order compelling discovery on the grounds that it invaded their right to privacy and freedoms of religion and association. The defendants attacked the protective order on the ground that it denied them freedom of of the press and of speech, guaranteed by the first amendment of the United States Constitution and by Const. art. 1, § 5.

The trial court filed for a memorandum opinion explaining the protective order. In that opinion it found that the defendants were entitled to make discovery under Superior Court Civil Rule 26(b)(1) and that the plaintiffs had reasonable grounds for the issuance of a protective order in connection with information covered by the order. It also observed that if protective orders were not available, "it could have a chilling effect on a party's willingness to bring his case to court." The court said:

> If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights

> as can result from an impingement upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

Clerk's Papers, at 63.

Both of the court's orders are before us on this discretionary review.

[The court's opinion upholding the protective order is not reproduced here.]

[2] Turning to the plaintiffs' cross appeal, the major contention is that requiring disclosure of membership lists, donors and benefactors violates the rights of privacy and the associational rights of these persons. As should be clear from our previous discussion, certain invasions of those rights are necessary to enable the courts to render a just decision upon the relevant facts. The protective order shields the plaintiffs from abuse of the discovery privilege. The more extensive protection which they desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right. There is no showing that the protective order is inadequate to prevent any abuse threatened by the defendants.

The plaintiffs, as the defendants point out, are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information. We have reviewed the cases cited in their brief and find none which supports the theory in the circumstances of this case. All of the evidence covered by the order compelling disclosure was relevant to the plaintiffs' claims and the defense of those claims, and their legitimate interests in privacy and association were protected by the court's order insofar as was possible without denying the defendants the right to develop their defenses.

With respect to this order, also, we find no abuse of discretion.

The orders are affirmed.

BRACHTENBACH, C.J., and Stafford, Williams, and Dore, J.J., concur.

APPENDIX E

51 Wash.App. 561

Keith Milton RHINEHART, a single person; the Aquarian Foundation, a Washington not-for-profit corporation; Lillian Young, a married person; and Ilse Taylor, representing women who were members of the Aquarian Foundation on or after March 17, 1978, Appellants,

and

Kathi Bailey, a married person; Toni Strauch, a married person; and Sylvia Corwin, Plaintiffs,

v.

The SEATTLE TIMES COMPANY, a Delaware corporation d/b/a The Seattle Times; The Walla Walla Union Bulletin, Inc.; Erik Lacitis and Jane Doe Lacitis; John Wilson and Rebecca Karen Wilson; John McCoy and Karen McCoy, Respondents.

No. 19801-7-I.

Court of Appeals of Washington,
Division 1.

May 31, 1988.

Reconsideration Denied Aug. 1, 1988.

Religious organization and individual members brought defamation suit against newspaper publisher and others. The Superior Court, King County, James Dore, J., dismissed, and appeal was taken. The Court of Appeals, Swanson, J., held that: (1) organization and members were not entitled to more extensive protective order; (2) First Amendment rights of organization and members were not violated by order compelling discovery of videotapes; (3) names and addresses of organization did not fall within scope of priest-penitent privilege;

(4) dismissal of complaint was warranted due to failure of organization and members to comply with discovery order; and (5) appeal was frivolous.

Affirmed and remanded.

1. Pretrial Procedure 414

Religious organization and individual members, who were granted protective order limiting discovery in their defamation suit arising out of newspaper articles about them to membership, donor and financial information compelled by prior order and restricting use of discovery information to litigation purposes, were not entitled to more extensive protective order covering information gained by means other than discovery process, including films and videotape; any objections to disclosure based upon privacy and confidentiality of members' identities were difficult to justify since two of the requested tapes had already been broadcast to the public on television, protective order which was given prohibited nonlitigation use of information regarding members' identities, and newspaper publisher and other defendants had interest in obtaining discovery in order to prepare trial defense. CR 26(c).

2. Constitutional Law 84.5(1)
Pretrial Procedure 413

Pretrial order, in defamation suit by religious organization and its members arising out of newspaper articles about "extravaganza" sponsored by organization's spiritual leader at state prison, compelling production of films and videotape of "extravaganza" did not violate members' right to free exercise of their religion; prior protective order shielded them against abuse of discovery related to members' identities, and there was no showing that protective order was inadequate to safeguard against any such threatened use of discovery. U.S.C.A Const.Amend. 1.

3. Pretrial Procedure 406

Religious organization and individual members who brought defamation suit arising out of newspaper articles about them failed to show that names and addresses of members fell within scope of priest-penitent privilege and that they were not subject to discovery. West's RCWA 5.60.060(3).

4. Pretrial Procedure 44

Remedy for party's failure to comply with discovery lies within trial court's discretion.

5. Appeal and Error 961

Absent manifest abuse of discretion, appellate court will not overturn trial court's exercise of its broad discretion under rule to impose sanctions for noncompliance with discovery order. CR 37.

6. Pretrial Procedure 435

Dismissal of defamation complaint was warranted due to failure of religious organization and individual members, who were suing newspaper publisher and others for articles about them, to comply with discovery order that they turn over films and videotapes of "extravaganza" at state prison which was subject of articles; publisher and other defendants were prejudiced by withholding of evidence relevant to preparation of their defense. U.S.C.A. Const. Amend. 1; CR 37.

7. Judges 51(1)

Any party in superior court proceeding has statutory right to one change of judge if he files motion supported by an affidavit of prejudice before trial court rules on any motion or issue which requires exercise of discretion. West's RCWA 4.12.040, 4.12.050.

8. Judges 51(2)

For purposes of statutory right of any party in superior court proceeding to one change of judge if he files motion or issue which requires exercise of discretion, setting or renoting and resetting cause or motion for hearing is calendaring action which falls outside the "discretionary" classification. West's RCWA 4.12.040, 4.12.050.

9. Judges 51(2)

For purposes of statutory right of any party in superior court proceeding to one change of judge if he files motion before trial court rules on any motion or issue which requires exercise of "discretion," rulings involving exercise of discretion include granting of continuance, issuance of process upon an application

for a modification of an order, and denial of request for jury trial. West's RCWA 4.12.040, 4.12.050.

10. Appeal--Frivolous Appeal--What Constitutes. An appeal is frivolous warranting the imposition of terms under RAP 18.9(a) if some of the contentions were decided against the appellant in a previous appeal or a related action and other contentions raised no debatable issues upon which reasonable minds could differ.

Nature of Action: Members of a religious organization sought damages for defamation and invasion of privacy from two newspapers. The Supreme Court at 98 Wn.2d 226 previously had affirmed a discovery order and a protective order.

Superior Court: The Superior Court for King County, No. 80-2-02460-4, James J. Dore, J., on December 5, 1986 and January 7, 1987, dismissed the action based on the plaintiffs' noncompliance with the discovery order.

Court of Appeals: Holding that the trial court's denial of a new protective order did not violate the plaintiffs' First Amendment rights, that revealing the names and addresses of the members of the religious organization would not violate the priest-penitent privilege, that the dismissal of the action was within the trial court's discretion, that the plaintiffs' affidavit of prejudice was not timely, that no actual prejudice of the trial judge was shown, and that the appeal was frivolous, the court *affirms* the judgement and *grants* the defendants attorney fees on appeal.

Jean Shiedler-Brown, for appellants.

Bruce E.H. Johnson, Howard Stambor, Davis, Wright & Jones, Evan L. Schwab, and *Bogle & Gates*, for respondents.

SWANSON J.__Keith Milton Rhinehart; the Aquarian Foundation, a Washington not-for-profit corporation; Ilse

Taylor; and Lillian Young[1] appeal the superior court order which dismissed their action for damages for defamation and invasion of privacy against the Seattle Times Company, a Delaware corporation d/b/a The Seattle Times; Walla Walla Union-Bulletin, Inc.; Erik and Jane Doe Lacitis, husband and wife; John and Rebecca Karen Wilson, husband and wife; and John and Karen McCoy, husband and wife. This appeal presents the following issues:

1. Did the dismissal of the appellants' complaint for noncompliance with the order compelling discovery of the films and videotape violate the appellants' right to the free exercise of religion?

2. Was discovery of the Aquarian Foundation's members' names and addresses protected by the priest-penitent privilege?

---

[1] At oral argument appellants' counsel argued for the first time in this appeal that the dismissal of the action as to Ilse Taylor and Lillian Young was improper as a sanction for noncompliance with discovery since these individuals lacked custody or control over the requested videotape and films. At the January 7, 1987, hearing at which the appellants' action was dismissed as a discovery sanction, the respondents' counsel argued that the female plaintiffs were suing in a representative, not individual, capacity on behalf of all women members of the Aquarian Foundation as of March 17, 1978. The complaint appears to substantiate this contention.

In any event, appellants Taylor and Young do not claim, and the record does not indicate, that they responded to the request for production of the videotape and films stating that the tapes were not in their possession, control or custody. See La Chemise Lacoste v. Alligator Co., 60 F.R.D. 164 (D. Del. 1973). Absent a timely response or objection to a discovery request, the right to object may be waived. Fretz v. Keltner, 109 F.R.D. 303, 309 (D. Kan. 1985); 4 L. Orland, Wash. Prac., Rules Practice § 5427, at 153 (3d ed. 1983).

Moreover, appellants Taylor and Young have provided no argument or citation to legal authority in the appellate briefs in support of this contention. RAP 10.3(a)(5); Lassila v. Wenatchee, 89 Wn.2d 804, 809, 576 P2d 54 (1978); Puget Sound Nat'l Bank v. Honeywell, Inc., 40 Wn. App. 313, 317 n.1, 698 P.2d 584 (1985). We thus do not address this issue

3. Was the dismissal of the appellants' complaint for noncompliance with discovery an abuse of discretion?

4. Did the trial court er in denying the appellants' motion for a change of judge?

5. Should the appellants be assessed terms for frivolous appeal?

The facts underlying the action in this case and preceding this appeal have been set forth in Seattle Times Co. v. Rhinehart, 467 U.S. 20, 22-27, 81 L. Ed. 2d 17, 104 S. Ct. 2199, 2202-04 (1984) in part as follows:

> . . . Rhinehart is the spiritual leader of a religious group, the Aquarian Foundation. . . .
>
> In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. Altogether 11 articles appeared in the newspapers during the years 1973, 1978, and 1979. The five articles that appeared in 1973 focused on Rhinehart and the manner in which he operated the Foundation. They described seances conducted by Rhinehart in which people paid him to put them in touch with deceased relatives and friends. The articles also stated that Rhinehart had sold magical "stones" that had been "expelled" from his body. One article referred to Rhinehart's conviction, later vacated, for sodomy. The

four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla State Penitentiary. The articles stated that he had treated 1,100 inmates to a 6-hour-long show, during which he gave away between $35,000 and $50,000 in cash and prizes. On article described a "chorus line of girls [who] shed their gowns and bikinis and sang . . . ." . . .

Rhinehart brought this action in the Washington Superior Court on behalf of himself and the Foundation against the Seattle Times, the Walla Walla Union-Bulletin, the authors of the articles, and the spouses of the authors. Five female members of the Foundation who had participated in the presentation at the penitentiary joined the suit as plaintiffs. The complaint alleges that the articles contained statements that were "fictional and untrue," and that the defendants—petitioners here—knew, or should have known, they were false. According to the complaint, the articles "did and were calculated to hold [Rhinehart] up to public scorn, hatred and ridicule, and to impeach his honesty, integrity, virtue, religious philosophy, reputation as a person and in his profession as a spiritual leader." With respect to the Foundation, the complaint also states: "[T]he articles have, or may have had, the effect of discouraging contributions by the membership and public and thereby diminished the financial ability of the Foundation to pursue its corporate purposes." The complaint alleges that the articles misrepresented the role of the Foundation's "choir" and falsely implied that female members of the Foundation had "stripped off all their clothes and wantonly danced naked . . . ." The complaint requests $14,100,000 in damages for the alleged defamation and invasions of privacy.

Petitioners filed an answer, denying many of the allegations of the complaint and asserting affirmative defenses. Petitioners promptly initiated extensive discovery. They deposed Rhinehart, requested production of documents pertaining to the financial affairs of Rhinehart and the Foundation, and served extensive interrogatories on Rhinehart and the other respondents. Respondents turned over a number of financial documents, including several of Rhinehart's income tax returns. Respondents refused, however, to disclose certain financial information, the identity of the

Foundation's donors during the preceding 10 years, and a list of its members during that period.

Petitioners filed a motion under the State's Civil Rule 37 requesting an order compelling discovery. . . . Respondents . . . moved for a protective order preventing petitioners from disseminating any information gained through discovery. . . .

In a lengthy ruling, the trial court initially granted the motion to compel and ordered respondents to identify all donors who made contributions during the five years preceding the date of the complaint, along with the amounts donated. The court also required respondents to divulge enough membership information to substantiate any claims of diminished membership. Relying on *In re Halkin*, 194 U. S. App. D. C. 257, 598 F.2d 176 (1979), the court refused to issue a protective order. It stated that the facts alleged by respondents in support of their motion for such an order were too conclusory to warrant a finding of "good cause" as required by Washington Superior Court Civil Rule 26(c). . . .

Respondents filed a motion for reconsideration in which they renewed their motion for a protective order. They submitted affidavits of several Foundation members to support their request. . . .

Persuaded by these affidavits, the trial court issued a protective order covering all information obtained through the discovery process that pertained to "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs." The order prohibited petitioners from publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case. By its terms, the order did not apply to information gained by means other than the discovery process.

(Footnotes and citations omitted.)

Upon cross petitions for review, our State Supreme Court upheld the protective order against an attack on the basis of freedom of the press and of speech and the June 26, 1981, order compelling discovery against a challenge on

grounds of violations of the rights of privacy and of association. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 257–58, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984). The United States Supreme Court denied the appellants' petition for certiorari, 467 U.S. 1230 (1984), but granted the respondents' petition and upheld the protective order, *Seattle Times Co. v. Rhinehart*, 467 U.S. at 37.

During this time the original trial judge, who had moved to the State Court of Appeals, was replaced in the instant case by another judge. Upon the respondents' motion, the appellants were ordered to comply with the June 26, 1981, order compelling discovery by October 19, 1984. On that date, the appellants supplied nonresponsive and incomplete answers. In December 1984, the respondents served the appellants with a request for production of certain films and a videotape of the Walla Walla performance. The appellants did not file timely objections or responses.

A challenge to the same requests for production was pending in this court. In *Rhinehart v. KIRO*, 44 Wn. App. 707, 708–09, 723 P.2d 22 (1986), *review denied*, 108 Wn.2d 1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co.*, 108 S. Ct. 51 (1987), this court held that the order compelling discovery of the films and videotape did not violate the appellants' freedom of religious exercise. *KIRO*, at 711, further upheld the dismissal of the appellants' action against the respondents in that appeal for noncompliance with discovery.

In the instant case a scheduled October 31, 1986, hearing on the respondents' motions for dismissal for noncompliance with the 1981 discovery order and for a second order compelling discovery of the films and videotape was continued at the appellants' request because of a substitution of counsel. At this hearing the appellants' request for a change of judge was denied. At the rescheduled December 5, 1986, hearing, the trial judge dismissed the complaint of Rhinehart, the Aquarian Foundation and Kathi Bailey for noncompliance with the June 26, 1981, order compelling

discovery; ordered the production by December 15, 1986, of the films and videotape requested by the respondents; and denied the appellants' motions for a protective order and for clarification of the June 26, 1981, discovery order.

The appellants did not comply with the December 5, 1986, order compelling discovery. After a January 7, 1987, hearing, the trial judge entered findings of fact and conclusions of law and dismissed the complaint of all the plaintiffs for failure to comply with the December 5, 1986, order compelling discovery and denied the appellants' motion for reconsideration of the prior orders. This appeal followed. After oral argument the respondents filed a motion for leave to correct or supplement the record pursuant to RAP 9.10, which motion, unopposed by the appellants, was granted.

Free Exercise of Religion

The appellants contend that their First Amendment rights were violated by the dismissal of their complaint for noncompliance with the order compelling discovery of the films and videotape, which the appellants claim are sacred objects. The respondents assert that the claim that the tapes' sanctity precludes discovery is suspect in light of the television broadcast to the public of the films and the fact that the videotape was of a performance before 1,100 prison inmates. They further contend, without dispute, that upon the December 1984 service of the request for production of the films and videotape, the appellants failed to object within the time period required by CR 34(b). Consequently, they argue, any objection has been waived.

> A waiver of the right to object or of a protective order may result from a failure timely to respond or object [to a request for the production of documents]. *Alexander v. Parsons* (D.C.Mich.1977) 75 F.R.D. 536; *Perry v. Golub* (D.C.Ala.1976) 74 F.R.D. 360; *Leve v. Schering Corp.* (D.C.N.J.1975) 73 F.R.D. 537, *affirmed* (C.A.3d) 556 F.2d 567, *certiorari denied* 434 U.S. 833, 98 S.Ct. 118, 54 L.Ed.2d 93.

4 L. Orland, Wash. Prac., *Rules Practice* § 5427, at 153 (3d ed. 1983). In any event, we find no First Amendment violation.

The appellants argue that the denial of a requested protective order resulted in the violation of their right to the free exercise of religion since they were compelled to provide discovery of what they consider to be sacred objects without a proper protective order. The only protective order entered in the instant case is limited to discovery of membership, donor and financial information which was compelled by the June 26, 1981, order and restricts use of the discovery information to litigation purposes.

On November 26, 1986, the appellants filed a motion for a protective order as to discovery of the films and videotape which would have imposed the following restrictions:

> 2. Plaintiffs may comply with defendant Seattle Times' Second Request for Production of Documents as follows:
>
> (a) by allowing defendants to view the relevant portions of the films and videotapes requested therein in which the identities of person[s] depicted in the films and videotapes have been obscured.
>
> (b) that defendants need only produce for viewing such portions of the films and videotapes as defendants reasonably specify will provide information likely to lead to admissible evidence.
>
> (c) that defendants be prohibited from making any public disclosure of the films or making any use thereof except for the legitimate purposes of preparing for trial and no portions thereof should be entered into [the] public record without further order of this court.

The motion expressly states that the proposed protective order sought to permit compliance with production by allowing the respondents to view the films and videotape in the church. Besides limiting the films' use to litigation purposes, the requested protective order, unlike the prior protective order entered in the case, sought to impose certain other restrictions and conditions.

The respondents argue that *Rhinehart v. KIRO*, 44 Wn. App. 707, 723 P.2d 22 (1986), *review denied*, 108 Wn.2d

1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co.*, 108 S. Ct. 51 (1987), is controlling. In *KIRO*, at 708–09, an order compelling discovery of the three videotapes at issue in the instant case survived a challenge on grounds of a violation of the freedom to exercise religion. *KIRO*, at 709, notes that no showing was made that the protective order was inadequate to prevent abuse of discovery. The protective order in *KIRO* is similar to the 1981 protective order entered in the instant case in limiting the use of the discovery information to litigation purposes. *KIRO*, at 708.

The 1981 protective order was found not to violate freedom of the press or of speech. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 256, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984). Thus had the appellants sought such a protective order as to the compelled discovery of the films and videotape, it could not have been attacked on these First Amendment grounds. Instead, the appellants sought a protective order which would have imposed other restrictions and conditions. *Rhinehart*, at 257, states:

> The more extensive protection which [the plaintiffs] desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right.

The appellants here had no absolute right to a more extensive protective order.

[1, 2] CR 26(c) sets forth the procedure for requesting a protective order:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .

See Rhinehart, at 232. "'[G]ood cause' is established if the moving party shows that any of the harms spoken of in the

rule is threatened and can be avoided without impeding the discovery process." *Rhinehart*, at 256.

The appellants argue that the protective order was necessary to satisfy their objections to the discovery based upon privacy concerns, the priest–penitent privilege and the sacredness of the tapes. However, any objections to disclosure based upon privacy, the confidentiality of members' identities, and the showing of the tapes outside the sanctity of the church are difficult to justify since two of the requested tapes have already been broadcast to the public on television. *Rhinehart v. KIRO, supra* at 708–09. Further, the 1981 protective order prohibited the nonlitigation use of information regarding the members' identities acquired through the discovery process.

To be weighed against the appellants' asserted interests are the interests of the respondents, who are seeking discovery in order to prepare their trial defense. *See Rhinehart v. Seattle Times Co., supra* at 256. As both *Rhinehart v. Seattle Times Co., supra* at 257–58, and *Rhinehart v. KIRO, supra* at 709, note, the appellants "are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information." In requesting the particular protective order that they proposed, the appellants have failed to make the requisite "good cause" showing that any of the harms mentioned in the rule was threatened and could be avoided without impeding the discovery process. *Rhinehart v. Seattle Times Co., supra* at 256. The trial court did not abuse its discretion in denying the request for the more extensive protective order. *Rhinehart*, at 257.

Even if the refusal to issue the proposed protective order was not an abuse of discretion, the question is whether the order compelling the production of the films and videotape violated the appellants' right to the free exercise of their religion. Like the court in *Rhinehart v. KIRO, supra* at 708–09, we find meritless the appellants' argument that their freedom to exercise religion was violated by the order compelling discovery of the tapes. The cases upon which

they rely involve restrictions on the free exercise of religion and are inapposite. The discovery order here did not impinge upon their right to the free exercise of religion.

As *KIRO*, at 709, notes:

> Rhinehart and the Foundation are willing to allow KIRO and KOMO to view the "sacred" tapes. Their main objection is to their copying. It is thus not against their religious principles that these tapes may be viewed by persons other than members (such a position would be hard to maintain since two of the tapes had already been broadcast to the public at large). Rather, the appellants fear that the tapes will be disseminated to the public at large thus putting members at risk. It was precisely because of this argument that the trial court issued the protective order. The arguments propounded by appellants are really ones that should be made in support of an invasion of privacy action. Having lost this argument already, it appears that appellants are substituting religious freedom in its place.

Here the 1981 protective order shields the appellants against abuse of discovery related to the members' identities. In *Rhinehart v. Seattle Times Co., supra* at 257, our State Supreme Court found no showing that this same protective order was inadequate to safeguard against any such threatened abuse of discovery. Like the court in *Rhinehart v. KIRO, supra*, in which a similar protective order was entered upon the issuance of an order compelling discovery of the same films and videotape at issue here, we find no such a showing in the instant case.

Priest–Penitent Privilege[2]

RCW 5.60.060(3)[3] sets forth the priest–penitent privilege:

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[2]The respondents contend that an objection to discovery based upon the priest–penitent privilege is untimely, not having been asserted in the appellants' original responses to the discovery request, in their 1981 arguments to the trial court, or in their prior appeal of the order compelling discovery of, among other things, membership information. Our disposition of the privilege issue makes it unnecessary to address this contention.

> A clergyman or priest shall not, without the consent of a person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

[3] Although no Washington case has construed this statute, L. Orland and K. Tegland explain this privilege, including its limited scope, as follows:

> It provides that a priest or clergyman shall not be examined regarding any confession made to him in his professional capacity within the discipline of the church to which he belongs without the consent of the person making the confession. In statement the statute is narrow, requiring that the confession be made "in the course of discipline enjoined by the church to which he belongs." The proposed, but unadopted, privilege in the Federal Rules of Evidence would have protected a confidential communication to a clergyman in his professional character as spiritual advisor.

(Footnotes omitted.) Orland & Tegland, *The Federal Rules of Evidence: Washington Follows the Federal Model*, 15 Gonz. L. Rev. 277, 327–28 (1980).

> In the application of the [priest–penitent privilege] statutes, . . . it has been held, following the dictates of principle, that the privilege applies only to a communication made in the understood pursuance of that church discipline which gives rise to the confessional relation, and, therefore, in particular to confessions of sin only, not to communications of other tenor.

In re Estate of Soeder, 7 Ohio App. 2d 271, 302, 220 N.E.2d 547, 568–69 (1966); 8 J. Wigmore, *Evidence* § 2395, at 876–77 (1961). The appellants have not shown that the names and addresses of the Aquarian Foundation members fall within the scope of this privilege.

Dismissal of Complaint

On December 5, 1986, an order was entered dismissing the complaint of Rhinehart and the Aquarian Foundation

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[3]In 1987 RCW 5.60.060(3)'s language was altered to be gender neutral. Laws of 1987, ch. 439, § 11, p. 1791.

for failure to comply with the June 26, 1981, order compelling discovery of, among other things, membership information. On January 7, 1987, the trial court entered findings of fact, conclusions of law and an order dismissing the appellants' complaint for violating the December 5, 1986, order compelling discovery of certain films and a videotape.

CR 37(b)(2)(C) provides in part:

> If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party[.]

The remedy for a party's failure to comply with discovery lies within the trial court's discretion. *Rhinehart v. KIRO*, 44 Wn. App. 707, 710, 723 P.2d 22 (1986), *review denied*, 108 Wn.2d 1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co.*, 108 S. Ct. 51 (1987). Absent a manifest abuse of discretion, the appellate court will not overturn the trial court's exercise of its broad discretion under CR 37 to impose sanctions for noncompliance with a discovery order. *Rhinehart v. KIRO*, *supra*.

[4] In *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 228–29, 548 P.2d 558, *review denied*, 87 Wn.2d 1006 (1976), this court stated that

> the sanction of a default judgment authorized by CR 37(b)(2)(C) is a harsh remedy, which should only be granted where there has been a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial.
>
> But the unexplained failure to furnish complete and meaningful answers to these material interrogatories in the face of the court's order impels a conclusion that the refusal was willful. In this connection we note that CR

> 37(a)(3) allows the court to treat an evasive or incomplete answer as a "failure to answer." In our opinion, any violation of an explicit court order without reasonable excuse or justification must be deemed a willful act.
>
> We next turn to the contention that the sanction was unjust in that other less drastic alternatives to default would have been sufficient. Cases are legion holding that the choice of sanctions for violation of a discovery order is discretionary and that the particular facts and circumstances of each case will determine whether the discretion has been abused. In this state CR 37 vests broad discretion in the trial court as to choice of sanctions. A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

(Citations omitted.) *See Anderson v. Mohundro*, 24 Wn. App. 569, 573–74, 604 P.2d 181 (1979), *review denied*, 93 Wn.2d 1013 (1980).

The appellants contend that they substantially complied with the discovery order by supplying substantial information, including over 150 articles, while seeking to uphold their rights to privacy, freedom of association and freedom of religious exercise. They further contend that no prejudice to the respondents has been shown in that the videotapes sought concern only collateral issues and the respondents' interests are adequately protected by the appellants' offer to permit the tapes to be viewed in the church. Last, the appellants argue that dismissal was too severe a sanction since the videotapes had only limited relevance to either the claims or possible defenses and the appellants themselves would be unable to use the tapes at trial, thus jeopardizing their ability to sustain their burden of proof.

In June 1980 the respondents served on the appellants interrogatories and requests for production to which the appellants raised objections and filed vague and evasive responses. The respondents moved to compel discovery, and the appellants moved for a protective order. After several hearings on the two motions, the trial judge entered

both an order compelling discovery and a protective order on June 26, 1981. Upon cross petitions for review, our State Supreme Court upheld both orders. The United States Supreme Court denied the appellants' petition for certiorari, 467 U.S. 1230 (1984), but granted the respondents' petition and upheld the protective order, 467 U.S. 20, 37, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984).

On August 20, 1984, the appellants were ordered to comply with the June 26, 1981, order compelling discovery by October 19, 1984. On that date, the appellants provided incomplete and evasive responses.

In December 1984 the respondents requested that the appellants produce certain films and a videotape which they claim are relevant to the appellants' status as public figures, to the truth of the respondents' publications and to the damages which the appellants allegedly suffered. The requested videotape is of the Walla Walla performance, which was the subject of the respondents' publications that the appellants claim are defamatory. The appellants failed timely to object or respond to these requests. At the time, appellate review was pending of legal challenges to the same requests for production in *Rhinehart v. KIRO*, 44 Wn. App. 707, 723 P.2d 22 (1986), *review denied*, 108 Wn.2d 1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co.*, 108 S. Ct. 51 (1987). *KIRO* found meritless the appellants' objection to discovery on grounds of freedom of religious exercise and upheld the dismissal of the appellants' action as a discovery sanction under CR 37.

At the October 31, 1986, scheduled hearing on the respondents' motions (1) to dismiss the appellants' complaint for failure to comply with the 1981 order compelling discovery and (2) to compel production of the films and videotape, the appellants were granted a continuance based upon the substitution of counsel and were assessed terms of $250, and the appellants filed an affidavit of prejudice against the trial judge.

At the continued December 5, 1986, hearing, the trial court granted the respondents' motions to dismiss and to

compel production and denied the appellants' motions for a protective order and for clarification of the 1981 discovery order. The appellants did not comply with the December 5, 1986, order compelling discovery and filed a motion for reconsideration of the prior orders, which was subsequently denied. On January 7, 1987, findings and conclusions were entered and the appellants' complaint was dismissed with prejudice a second time based upon their failure to comply with the December 5 discovery order.

The facts here are similar to those in *Anderson v. Mohundro, supra* at 574–75, and *Rhinehart v. KIRO, supra* at 711. The appellants either supplied vague and incomplete answers or failed to respond to the interrogatories and requests for production so that the respondents were required to seek orders compelling discovery. The trial court issued two separate orders requiring compliance with discovery requests, subject to the protective order, and allowed a reasonable time for compliance. The appellants gave incomplete and evasive answers or no response. After hearing the parties' arguments, the trial court found that the appellants had violated the orders compelling discovery and entered orders of dismissal on December 5, 1986, for noncompliance with the June 26, 1981, discovery order and on January 7, 1987, for refusing to obey the December 5, 1986, discovery order.

Although the appellants claim that their failure to comply was neither willful nor deliberate since it was based upon their First Amendment rights, these objections were rejected in *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984), and *Rhinehart v. KIRO, supra*. "A violation of the discovery rules is willful if done without a reasonable excuse." *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 836, 696 P.2d 28, *review denied*, 103 Wn.2d 1040 (1985); *Rhinehart v. KIRO, supra*. The respondents have been prejudiced by the withholding of evidence relevant to the preparation of their defense, and no less drastic sanction would suffice. *See Hampson v. Ramer*, 47 Wn. App.

806, 815, 737 P.2d 298 (1987); *Anderson v. Mohundro, supra* at 575. We will not disturb the trial court's exercise of discretion here. *Rhinehart v. KIRO, supra.*

ALLEGED TRIAL COURT PREJUDICE

Under RCW 4.12.040 and .050, any party in a superior court proceeding has the right to one change of judge if he files a motion supported by an affidavit of prejudice before the trial court rules on any motion or issue which requires the exercise of discretion. *State v. Hansen,* 107 Wn.2d 331, 333, 728 P.2d 593 (1986); *In re Estate of Shaughnessy,* 104 Wn.2d 89, 92, 702 P.2d 132 (1985).

The appellants contend that the denial of their request for a change of judge was error since no discretionary ruling had been made before the affidavit of prejudice was filed. Discretionary rulings exclude

> the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail[.]

RCW 4.12.050; *Wilson v. Henkle,* 45 Wn. App. 162, 172, 724 P.2d 1069 (1986). Setting or renoting and resetting a cause or motion for hearing is a calendaring action which falls outside the discretionary classification. *State v. Dixon,* 74 Wn.2d 700, 703, 446 P.2d 329 (1968).

Rulings involving the exercise of discretion include the granting of a continuance, *State v. Maxfield,* 46 Wn.2d 822, 829, 285 P.2d 887 (1955); the issuance of process upon an application for a modification of an order, *State ex rel. Mead v. Superior Court,* 108 Wash. 636, 640, 185 P. 628 (1919); and the denial of a request for a jury trial, *State ex rel. Farmer v. Bell,* 101 Wash. 133, 134, 172 P. 221 (1918).

[5] The exercise of discretion is not involved where a certain action or result follows as a matter of right upon a mere request; rather, the court's discretion is invoked only where, in the exercise of that discretion, the court may either grant or deny a party's request. *State ex rel. Mead v. Superior Court, supra.* Here both the August 20, 1984,

order setting October 19, 1984, as the date for complying with the June 26, 1981, discovery order and the October 31, 1986, order permitting the substitution of counsel were discretionary rulings so that the affidavit of prejudice was filed too late.[4]

The rulings in the instant case are distinguishable from the judge's actions which were found not to involve the exercise of discretion in *In re Hiebert*, 28 Wn. App. 905, 910, 627 P.2d 551 (1981). In *Hiebert*, at 909, the judge had reappointed the same guardian ad litem for the child, appointed an attorney for the father, reappointed the attorney for the mother, and set the case for hearing upon a second petition for permanent deprivation of parental rights. *Hiebert*, at 910, notes: "In most cases, only after the appointment of counsel would the law pertaining to affidavits of prejudice be known to the party." In the instant case, prior to the most recent substitution of appellants' counsel, the appellants had other attorneys representing them so that *Hiebert* is inapposite. Setting the case for a hearing in *Hiebert* was a calendaring action excluded from the discretionary classification under RCW 4.12.050. *Wilson v. Henkle, supra.*

[6] Although prejudice is not deemed to be established since the appellants failed timely to comply with the statutory requirements, *State v. Cockrell*, 102 Wn.2d 561, 565, 689 P.2d 32 (1984), the appellants nonetheless argue that actual prejudice is shown in certain comments of Judge Dore during the proceedings. Since the appellants cite no legal authority in support of their actual prejudice argument, we need not address this issue. *Puget Sound Nat'l Bank v. Honeywell, Inc.*, 40 Wn. App. 313, 317 n.1, 698 P.2d 584 (1985). In any event, the appellants have failed to

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[4]The letter purportedly reserving the appellants' right to file an affidavit of prejudice against Judge Dore, referred to in the Brief of Appellants, at 4, is not in the record. The citation to the record indicated in the appellants' brief is to a "Declaration of Counsel" in which the appellants' present counsel states, among other things: "This case is preassigned and to my knowledge the assigned judge has not made decisions affecting these substantive matters."

make the requisite "affirmative showing of prejudice which would alter the outcome of the pending litigation" to be entitled to relief on this ground. (Citation omitted). *Williams & Mauseth Ins. Brokers, Inc. v. Chapple,* 11 Wn. App. 623, 629, 524 P.2d 431 (1974).

The judge's comments at the October 31, 1986, December 5, 1986, and January 7, 1987, hearings, which were made in rendering his decisions on motions before him, do not necessarily and inevitably compel the conclusion that the trial court was prejudiced against the appellants. *Williams & Mauseth Ins. Brokers, Inc. v. Chapple, supra.* At the October 31 hearing the judge granted the appellants' motion for a continuance and assessed them $250 in terms. Nevertheless, it cannot be said that the award of terms is evidence of unfair prejudice against the appellants since a continuance was sought on the basis that on the day of the scheduled hearing on the respondents' motions to dismiss and to compel production of the videotape and films, the appellants requested the substitution of counsel and their new counsel requested time to review the record before a hearing on the motions.

At the December 5 hearing the respondents' proposed orders to compel discovery or dismiss and to dismiss were entered, but their request for reimbursement of their incurred expenses was denied. Similarly on January 7, 1987, the respondents' second proposed order of dismissal was entered and the appellants' reconsideration motion was denied, but an assessment of terms against the appellants was denied.

Frivolous Appeal

The respondents seek, on two grounds, an attorney fee award as terms for a frivolous appeal. The first basis, CR 11, which is made applicable to appeals by RAP 18.7, provides in part:

> The signature of a party or of an attorney constitutes a certificate by him that he has read the pleading, motion, or legal memorandum; that to the best of his knowledge,

> information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

See Miller v. Badgley, 51 Wn. App. 285, 298–99, 753 P.2d 530 (1988). A party or an attorney or both may be assessed litigation expenses, including reasonable attorney fees, for a CR 11 violation. *See Wilson v. Henkle*, 45 Wn. App. 162, 174, 724 P.2d 1069 (1986). Here in entering the second order of dismissal, the trial court concluded that the appellants' objections to complying with the December 5, 1986, order compelling discovery were "frivolous and in bad faith because this issue has already been decided against them in this lawsuit and in another lawsuit."

[7] The respondents' second asserted basis for an attorney fee award, RAP 18.9(a), authorizes this court to impose sanctions against a party who brings an appeal for the purpose of delay where the other party is harmed by the delay. *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983). An appeal is frivolous and brought for the purpose of delay if it presents no debatable issues upon which reasonable minds might differ and is so devoid of merit that there was no reasonable possibility of reversal. *Millers Cas. Ins. Co. v. Briggs, supra*.

Here even if some of the issues presented in this appeal have not been waived, the issues are devoid of merit with no reasonable possibility of reversal since most of the issues are governed by *Rhinehart v. Seattle Times Co., supra,*

and *Rhinehart v. KIRO, supra*, and the other issues are not debatable issues upon which reasonable minds might differ.

We affirm the judgment below and award terms for a frivolous appeal. Under RAP 18.1(e) we remand for the trial court to determine what it deems to be a reasonable amount of the respondents' appellate attorney fees which is to be assessed against the appellants as terms. *See Singleton v. Frost*, 108 Wn.2d 723, 730–34, 742 P.2d 1224 (1987).

WILLIAMS and GROSSE, JJ., concur.

APPENDIX F

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION,a Washington not-for-profit corporation; LILLIAN YOUNG, a married person, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Appellants,

and

THE SEATTLE TIMES, a Delaware corporation, d/b/a/ The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN McCOY and KAREN McCOY,

Respondents.

No. 19801-7-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellants having filed their motion for reconsideration herein; the respondents having filed their answer to said motion, and the court having determined that it should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same hereby is, denied.

Dated this 1st day of August, 1988.

/s/
Acting Chief Judge

APPENDIX G

The Supreme Court
State of Washington

November 29, 1988

Ms. Jean M. Schiedler-Brown
Attorney at Law
606 Post Avenue, #101
Seattle, Washington 98104

Davis, Wright & Jones
Mr. Bruce E. Johnson
Mr. Howard E. Johnson
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688

Re: Supreme Court No. 55515 - 0 -
Keith Milton Rhinehart, et al.
v. The Seattle Times, et al.
Court of Appeals No. 19801 - 7 - I

Counsel:

The above entitled petition for review was considered by the court on its November 29, 1988, petition for review calendar.

The petition was denied by order number 185/78 filed on November 29, 1988.

Very truly yours,
/s/ Steven P. Helgeson
Deputy Clerk

SPH : mja

APPENDIX H

Superior Court No. 80-2-02460-4
Appeals Court No. 19801-7-I
Supreme Court No. 55515-0

IN THE SUPREME
COURT OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART,
a single person;
THE AQUARIAN FOUNDATION,
a Washington not-for-profit corporation;
KATHI BAILEY, a married person;
LILLIAN YOUNG, a married person;
TONI STRAUCH, a married person; and
ILSE TAYLOR, representing women who
were members of the Aquarian Foundation
on or after March 17, 1978;

Appellants,

v.

JAN 18 1989
COURT OF APPEALS
OF WASHINGTON

THE SEATTLE TIMES,
a Delaware Corporation,
d/b/a The Seattle Times;
WALLA WALLA UNION-BULLETIN, INC.;
ERIK LACITIS and JANE DOE LACITIS;
JOHN WILSON and REBECCA DAREN WILSON;
JOHN McCOY and KAREN McCOY;

Respondents.

NOTICE OF APPEAL
TO U.S. SUPREME COURT

JEAN SCHIEDLER-BROWN
Attorney for Appellant

Superior Court No. 80-2-02460-4
Appeals Court No. 19801-7-I
Supreme Court No. 55515-0

IN THE SUPREME
COURT OF THE STATE OF WASHINGTON

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TONI STRAUCH, a married person; and
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JOHN WILSON and REBECCA DAREN WILSON;
JOHN McCOY and KAREN McCOY;

Respondents.

NOTICE OF APPEAL
TO U.S. SUPREME COURT

JEAN SCHIEDLER-BROWN
Attorney for Appellant

RECEIVED
JAN 18 1989
CLERK OF SUPREME COURT
STATE OF WASHINGTON

Superior Court No. 80-2-02460-4
Appeals Court No. 19801-7-I
Supreme Court No. 55515-0

JAN 18 1989
Superior Court Clerk

IN THE SUPREME
COURT OF THE STATE OF WASHINGTON

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JOHN WILSON and REBECCA DAREN WILSON;
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Respondents.

NOTICE OF APPEAL
TO U.S. SUPREME COURT

JEAN SCHIEDLER-BROWN
Attorney for Appellant

APPENDIX I

U.S. CONSTITUTION
AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX I

U.S. CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX K

RCW 4.84.185

4.84.185 Prevailing party to receive expenses for opposing frivolous action or defense. In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after an order of dismissal, order on summary judgement, or final judgement after the trial or other final order terminating the action as to the prevailing party. In no event may such motion be filed more than thirty days after entry of the order. The judge shall consider the action, counterclaim, cross-claim. third party claim, or defense as a whole.

The provisions of this section apply unless otherwise specifically provided by statute. [1987 c 212 § 201; 1983 c 127 § 1.]

Supreme Court, U.S.
FILED
JAN 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 88-1491

IN THE SUPREME COURT
COURT OF THE UNITED STATES
OF AMERICA

TERM _____

APPENDICES TO JURISDICTIONAL STATEMENT

SUPPLEMENTAL APPENDIX

KEITH MILTON RHINEHART,
a single person;
THE AQUARIAN FOUNDATION,
a Washington not-for-profit Corporation;
KATHI BAILEY, a married person;
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TONI STRAUCH, a married person; and
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JOHN WILSON and REBECCA KAREN WILSON;
JOHN McCOY and KAREN McCOY;

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
WASHINGTON

Counsel for Appellants:
JEAN SCHIEDLER-BROWN
Law Offices of Jean Shiedler-Brown Assoc., PS.
606 Post Ave., Suite 101
Seattle, WA 98104
(206) 223-1888

APPENDIX L

Superior Court No. 80-2-02460-4
Appeals Court No. 19801-7-I
Supreme Court No. 55515-0

IN THE SUPREME
COURT OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART,
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JAN 18 1989
COURT OF APPEALS
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JOHN McCOY and KAREN McCOY;

Respondents.

NOTICE OF APPEAL
TO U.S. SUPREME COURT

JEAN SCHIEDLER-BROWN
Attorney for Appellant

Appellants herein hereby appeal from the decision of the Washington State Supreme Court denying discretionary review on November 29, 1988, of the Court of Appeals, Division I, decision, dated May , 1988. This appeal is taken pursuant to 28 USC 1257 and 28 USC 2101 [c], and 28 USC § 2403 [b] may be applicable. The Attorney General of the State of Washington will be served a copy of this notice.

Dated this 17 day of January, 1989.

Jean Schiedler-Brown

Jean Schiedler-Brown
Attorney for Appellants
606 Post Avenue
Suite 101
Seattle, WA 98104
[206] 223-1888

Superior Court No. 80-2-02460-4
Appeals Court No. 19801-7-I
Supreme Court No. 55515-0

IN THE SUPREME
COURT OF THE STATE OF WASHINGTON

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JEAN SCHIEDLER-BROWN
Attorney for Appellant

RECEIVED
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Attorney for Appellants
606 Post Avenue
Suite 101
Seattle, WA 98104
[206] 223-1888

Superior Court No. 80-2-02460-4
Appeals Court No. 19801-7-I
Supreme Court No. 55515-0

JAN 18 1989
Superior Court Clerk

IN THE SUPREME
COURT OF THE STATE OF WASHINGTON

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No. 88-1491

(4)

Supreme Court, U.S.
FILED
MAR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person; LILLIAN YOUNG, a married person; TONI STRAUCH, a married person; and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978, *Appellants*,

v.

SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN MCCOY and KAREN MCCOY, *Appellees*.

On Appeal from the Court of Appeals of the State of Washington

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MOTION TO DISMISS

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QUESTIONS PRESENTED

1. May a plaintiff in a civil action for defamation and invasion of privacy assert a constitutional privilege to withhold relevant evidence while simultaneously seeking damages premised upon the allegedly privileged information?

2. May a plaintiff in a civil action for defamation and invasion of privacy assert a constitutional privilege to withhold, among other things, a copy of a videotape depicting the very events at issue in the plaintiff's lawsuit?

3. Does a state appellate court violate the due process and equal protection clauses of the Fourteenth Amendment when it concludes, pursuant to well-established rules and case law, that an appeal presenting the same meritless issues that were asserted unsuccessfully in at least two prior appeals by the same litigants is a frivolous appeal?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1491

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person; LILLIAN YOUNG, a married person; TONI STRAUCH, a married person; and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978, *Appellants*,

v.

SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN MCCOY and KAREN MCCOY, *Appellees*.

On Appeal from the Court of Appeals of the State of Washington

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MOTION TO DISMISS

Appellees [1] move to dismiss this appeal on the grounds that it does not present a substantial federal question

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[1] Appellee Walla Walla Union-Bulletin, Inc., is a wholly-owned subsidiary of appellee Seattle Times Company. Blethen Corporation, a privately-held corporation, owns 50.5% and Ridder Publications, Inc., a company that is affiliated with Knight-Ridder Newspapers, Inc., a publicly-held corporation, owns 49.5% of the common voting stock of Seattle Times Company.

and that the federal questions sought to be reviewed were neither timely nor properly raised or were not expressly passed on by the Washington Court of Appeals. In the alternative, in the event the Court concludes that the proper mode of review is by petition for certiorari, appellees request that the writ of certiorari be denied.

OPINION BELOW

The opinion of the Washington Court of Appeals is published. *Rhinehart v. Seattle Times Co.*, 51 Wash. App. 561, 754 P.2d 1243, *review denied*, 111 Wash. 2d 1025 (1988).

JURISDICTION

The judgment of the Washington Court of Appeals was issued on May 31, 1988. Appellants [2] filed a timely motion for reconsideration with the Court of Appeals, which was denied on August 1, 1988, and a timely petition for review with the Washington Supreme Court, which was denied on November 29, 1988. On January 18, 1989, appellants filed a "Notice of Appeal to U.S. Supreme Court" in the King County Superior Court and in the Washington Supreme Court. Appellees' counsel was served with a copy of the "Notice of Appeal" on January 24, 1989.

There is some doubt as to whether an appeal properly lies.[3] It is clear that the first two of appellants' issues

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[2] Only four of the seven plaintiffs who are identified as "appellants" in the Jurisdictional Statement were in fact parties in the Washington Court of Appeals. "Appellant" Sylvia Corwin dismissed her claims against appellees on December 19, 1980, and "appellants" Kathi Bailey and Toni Strauch did not appeal the trial court's January 7, 1987 dismissal order. *See Don't Bankrupt Washington Committee v. Continental Illinois Nat'l Bank & Trust Co.*, 460 U.S. 1077 (1983) (dismissing appeal for lack of jurisdiction because appellant lacked standing to bring appeal).

[3] This Court's appeal jurisdiction was eliminated by Pub. L. No. 100-352, 102 Stat. 662 (1988). The repeal did not, however, "affect

must be presented by means of a petition for certiorari, because they involve a "right, privilege or immunity [that] is specially set up or claimed under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(3). Indeed, their first and second issues are simply a replay of their earlier petition for certiorari. *See Rhinehart v. Seattle Times*, 467 U.S. 1230 (1984). As for their third issue, while appellants claim that they are challenging a Washington statute,[4] the finding that their appeal was frivolous was premised upon three Washington court rules.[5] In the court below, appellants did not draw in question the "validity" of any of these court rules, as required by 28 U.S.C. § 1257(2). *See Rohr Aircraft Corp. v. San Diego County*, 362 U.S. 628, 629-30 (1960);

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the right to review or the manner of reviewing the judgment or decree of a court that was entered" before the effective date of the statute. 102 Stat. 664. The judgment of the Court of Appeals was issued on May 31, 1988, prior to the enactment of the statute. Therefore, the propriety of an appeal must be determined by 28 U.S.C. § 1257(2) as it existed before the recent legislation. If it concludes that an appeal does not lie, this Court may treat the appeal as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103.

[4] *See* J.S. at 1, 21-28. References to the Jurisdictional Statement and its Appendix will be designated "J.S." and "J.S. App." The Clerk's Papers and Supplemental Clerk's Papers, which were filed in the trial court and became part of the record on appeal, are designated as "CP" and "SCP," respectively. The Transcript of Proceedings in the trial court is designated as "RP." Documents that were filed by the parties in the Washington appellate courts are identified by name and filing date.

[5] J.S. App. at 40-42. The fact that appellants' attack is properly directed at the application of state court rules rather than a state statute does not of itself prevent resort to 28 U.S.C. § 1257(2). This Court has treated a challenge to the validity of a state court rule as, in effect, a challenge to a state statute and therefore properly a subject of the Court's appeal jurisdiction. *See, e.g., In re R.M.J.*, 455 U.S. 191 (1982); *Chandler v. Florida*, 449 U.S. 560 (1981); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

Wilson v. Cook, 327 U.S. 474, 482 (1946); *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 259 (1920).

COURT RULES INVOLVED

The Washington Court of Appeals relied upon three court rules in finding appellants' appeal to be frivolous: (A) Washington Rule of Appellate Procedure ("RAP") 18.7, attached as Appendix A; (B) Washington Civil Rule ("CR") 11, attached as Appendix B; and (C) Washington Rule of Appellate Procedure ("RAP") 18.9(a), attached as Appendix C.

STATEMENT OF THE CASE

This Court is familiar with this lawsuit:

> In recent years, the Seattle Times and the Walla Walla Union-Bulletin have published stories about Rhinehart and the Foundation. All together 11 articles appeared in the newspapers during the years 1973, 1978, and 1979. . . . The four articles that appeared in 1978 concentrated on an "extravaganza" sponsored by Rhinehart at the Walla Walla State Penitentiary. The article stated that he had treated 1,100 inmatees to a six-hour-long show, during which he gave away between $35,000 and $50,000 in cash and prizes. One article described a "chorus line of girls [who] shed their gowns and bikinis and sang . . ."
>
> . . .
>
> Rhinehart brought this action in the Washington Superior Court on behalf of himself and the Foundation against the Seattle Times, the Walla Walla Union-Bulletin, the authors of the articles, and the spouses of the authors . . . . The complaint alleges that the articles contained statements that were "fictional and untrue" and that the defendants . . . knew, or should have known, they were false. . . . With respect to the Foundation, the complaint . . . states "[T]he articles have, or may have had, the effect of discouraging contributions by the membership and public and thereby diminished the financial

> ability of the Foundation to pursue its corporate purposes." . . . The complaint alleges that the articles misrepresented the role of the Foundation's "choir" and falsely implied that female members of the Foundation had "stripped off all their clothes and wantonly danced naked. . . ."

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 22-23 (1984) (citations omitted; footnotes omitted).

The issue in *Seattle Times* was the constitutionality of a protective order issued by the King County Superior Court on June 26, 1981, which prohibited publication or dissemination of any information relating to appellants' "financial affairs" or the "names and addresses" of any Foundation members or donors obtained "through the use of all of the discovery processes." SCP 1513-14. This Court unanimously concluded that the protective order did not violate the First Amendment of the United States Constitution:

> To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required. . . . The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

Seattle Times, 467 U.S. at 36.

On the same day it issued the protective order that was at issue in *Seattle Times*, the King County Superior Court entered an order compelling discovery, which required appellants to answer various interrogatories served in 1980. Among other things, the court "ordered [appellants] to identify all donors who made contributions during the five years preceding the date of the complaint, along with the amounts donated." *Seattle Times*, 467 U.S. at 25. Appellants immediately filed an interlocutory

appeal, claiming the order violated their constitutional rights of religion, association, and privacy.

Accepting discretionary review, the Washington Supreme Court rejected their arguments and upheld the discovery order in its entirety in December 1982. The court stated:

> Turning to the plaintiffs' cross appeal, the major contention is that requiring disclosure of membership lists, donors and benefactors violates the rights of privacy and the associational rights of these persons. As should be clear from our previous discussion, certain invasions of those rights are necessary to enable the courts to render a just decision upon the relevant facts. The protective order shields the plaintiffs from abuse of the discovery privilege. The more extensive protection which they desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right. There is no showing that the protective order is inadequate to prevent any abuse threatened by the defendants.
>
> The plaintiffs, as the defendants point out, are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information. We have reviewed the cases cited in their brief and find none which supports the theory in the circumstances of this case. All of the evidence covered by the order compelling disclosure was relevant to the plaintiffs' claims and the defense of those claims, and their legitimate interests in privacy and association were protected by the court's order insofar as was possible without denying the defendants the right to develop their defenses.

Rhinehart v. Seattle Times Co., 98 Wash. 2d 226, 257-58, 654 P.2d 673, 690-91 (1982). Appellants unsucessfully sought certiorari in this Court. *Rhinehart v. Seattle Times*, 467 U.S. 1230 (1984).

The case was then remanded to King County Superior Court, and the trial judge, the Honorable James J. Dore, ordered appellants to comply with the discovery order. SCP 1660-1740, 1822-23. Appellants, instead, served incomplete and evasive answers and responses. CP 201-14; J.S. App. at 27, 36, 37. Appellees next served a request for production of documents, requesting two films and a videotape that appellants had made of the 1978 Walla Walla performance that was the subject of their lawsuit. CP 168-70. Appellants did not file timely objections or responses to this request for production. J.S. App. at 27, 32 n.2.

In October 1986, appellees moved to dismiss for failure to comply with the 1981 discovery order. CP 171-73. At the same time, appellees filed a motion to compel production of the films and the Walla Walla videotape. CP 215-57. In response, appellants moved to "clarify" the 1981 discovery order and demanded a new protective order, because they claimed the films and videotape allegedly "would reveal the names of members of the Aquarian Foundation." CP 344-83, 421-78; SCP 1840; Respondents' Motion for Leave to Correct or Supplement the Record at Ex. A, filed Mar. 8, 1988.

Appellees opposed these motions, noting that the 1981 discovery order had already been affirmed by the Washington Supreme Court and that any questions as to the discoverability of the films and the Walla Walla videotape had been resolved by the Court of Appeals.[6] CP 521-42. In response, appellants devised a new objection to the enforceability of the 1981 discovery order. They

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[6] In August 1986, in a defamation lawsuit filed by these appellants against other media defendants, the court held that the films and videotape were properly discoverable and that appellants' objections were "without merit." *Rhinehart v. KIRO, Inc.*, 44 Wash. App. 707, 711. 723 P.2d 22, 25 (1986), *review denied*, 108 Wash. 2d 1008, *appeal dismissed sub nom., Rhinehart v. Tribune Pub. Co.*, 108 S. Ct. 51 (1987).

claimed that, to the extent it sought the names and addresses of Foundation members and donors, the order violated RCW 5.60.060(3), Washington's statutory priest-penitent privilege, which prohibits the testimony as to any "confession" made to a clergyman or priest. RP (Dec. 5, 1986) at 3-14.

Appellants refused to comply with the 1981 discovery order or with the trial court's order that they produce the films and the Walla Walla videotape. CP 344, 498-99, 545-47, 551-80, 581-635, 637-42, 643-45. On January 7, 1987, the court dismissed their complaint with prejudice. CP 654-56, 657-62.

Appellants appealed their dismissals. Appellees warned appellants and informed the Court of Appeals that they would seek appropriate sanctions because the appeal was "patently frivolous." Answer to Civil Appeal Statement at 10, filed Jan. 27, 1987. In their brief of the Court of Appeals, appellees renewed this request. Brief of Respondents at 66-67, filed Nov. 9, 1987.

When appellants submitted their Reply Brief, they did not suggest any constitutional impediment to the court's authority to find that their appeal was frivolous or to impose appropriate sanctions. *See* Reply Brief of Appellants, filed Nov. 30, 1987.

On May 31, 1988, the Court of Appeals issued its decision, affirming the dismissal orders, holding that the appeal was frivolous, and remanding to the trial court for a determination of the amount of attorneys' fees and expenses to be awarded appellees. J.S. App. at 19-42. The court stated:

> Here even if some of the issues presented in this appeal have not been waived, the issues are devoid of merit with no reasonable possibility of reversal since most of the issues are governed by *Rhinehart v. Seattle Times Co., supra*, and *Rhinehart v. KIRO,*

> *supra*, and the other issues are not debatable issues upon which reasonable minds might differ.

J.S. App. at 41-42.

Appellants moved for reconsideration with the Court of Appeals, arguing that the court's decision violated their equal protection rights. Motion for Reconsideration at 7-8, filed June 20, 1988. Respondents opposed reconsideration. Respondents' Answer to Motion for Reconsideration, filed July 22, 1988. The Court of Appeals denied reconsideration on August 1, 1988. J.S. App. at 43.

On August 31, 1988, appellants sought review with the Washington Supreme Court. They argued that the "ruling that this appeal is frivolous violates appellants' due process rights." Petition for Review at 12, filed Aug. 31, 1988. Appellants also asserted that "[t]he finding of frivolity impinges on the constitutional right of access to the courts [amendment 6] and freedom of speech [amendment 7.] [*sic*]." *Id.* at 13. Appellees opposed review. Respondents' Answer to Petition for Review, filed Sept. 22, 1988. The Washington Supreme Court denied review on November 29, 1988. J.S. App. at 44.

ARGUMENT

I. APPELLANTS' CLAIM THAT THEY HAVE A CONSTITUTIONAL RIGHT TO AVOID CIVIL DISCOVERY IS NOT A SUBSTANTIAL ISSUE THAT WARRANTS REVIEW BY THIS COURT.

A. Appellants Have Three Times Unsuccessfully Presented These Same Arguments to This Court—Their Fourth Attempt Offers Nothing New.

This is appellants' fourth attempt to interest this Court in their theory that they are immune under the United States Constitution from the obligations of civil discovery. Each attempt has been unsuccessful.[7]

This appeal, which challenges the identical order that resulted in a denial of certiorari in *Rhinehart v. Seattle Times*, 467 U.S. 1230 (1984) and the same discovery request that was the subject of their unsuccessful appeal in *Rhinehart v. Tribune Pub. Co.*, 108 S. Ct. 51 (1987), should be treated no differently. In neither case was review by this Court warranted or appropriate. The facts and the law have not changed, and the Court should dismiss this appeal as well.

1. *Appellants Cannot Resurrect Their Unsuccessful Petition for Certiorari By Asserting a Frivolous and Untimely State Law Objection to Discovery.*

Appellants' constitutional challenge to the 1981 discovery order was concluded with the Washington Supreme

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[7] *See Rhinehart v. Seattle Times*, 467 U.S. 1230 (1984) (denying certiorari as to the identical 1981 order that appellants again seek to challenge in this appeal); *Rhinehart v. Tribune Pub. Co.*, 108 S. Ct. 51 (1987) (dismissing appeal challenging discoverability of the same Walla Walla videotape that is at issue in this appeal); *Aquarian Foundation v. Law Offices of Edwards & Barbieri*, 108 S. Ct. 222 (1987), *rehearing denied*, 108 S. Ct. 1065 (1988) (dismissing appeal claiming constitutional right to refuse to disclose the address of appellant Lillian Young and her husband, Steve Young, in a collection action filed by appellants' former attorneys in *Rhinehart v. Seattle Times, supra*).

Court's December 1982 decision and this Court's denial of certiorari in 1984. *Rhinehart v. Seattle Times*, 467 U.S. 1230 (1984). After remand, however, appellants refused to comply with the discovery order and offered a new objection—that the Washington priest-penitent privilege exempted them from compliance with discovery. On appeal they did not argue any federal constitutional objections to the 1981 order. *See* Brief of Appellants at 33-35, filed May 20, 1987.

The Court of Appeals decided to entertain (and reject as frivolous) the newly-asserted state law objection. J.S. App. at 32-33, 40-42. While appellants had thus persuaded the court to consider a meritless state law objection that they properly should have asserted eight years earlier, the decision involved only nonfederal issues and does not provide a platform for demanding a second opportunity to assert their earlier, unsuccessful, federal challenge.[8] *See Rio Grande Western Ry. Co. v. Stringham*, 239 U.S. 44 (1915), *overruled on other grounds*, *Great Northern Ry. v. United States*, 315 U.S. 262 (1942).

B. Appellants Have Not Cited Any Decision of this Court That Is Inconsistent With the Decision Below.

Appellants' claim that the decision below conflicts with *NAACP v. Alabama*, 357 U.S. 449 (1958), is, quite

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[8] Appellants suggest that the Court should disregard its 1984 denial of certiorari because in opposing that petition appellees had argued, among other things, that "the decision was not ripe for review and would be an improper advisory opinion if accepted for review at that time." J.S. at 11. Appellees' argument was premised upon the final paragraph in the 1981 discovery order, which reserved to the trial court "the right to redetermine what discovery shall be ordered in the event the protective order is modified on review." CP 151. But this reservation language ceased to have any significance or effect after May 21, 1984, when this Court upheld the protective order in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). Thus, the Court's denial of certiorari on June 4, 1984, involved a final order. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975).

simply, wrong.[9] As appellees noted almost six years ago, when appellants first sought to challenge the 1981 discovery order in this Court:

> All of the information requested in respondents' interrogatories is directly related to the claims that petitioners themselves have put in issue. . . . Thus, despite petitioners' attempt to associate their position with the First Amendment principles articulated by this Court in *NAACP v. Alabama*, 357 U.S. 449 (1958), this case does not involve state intrusion into associational or privacy interests. Rather, the case simply turns upon whether a plaintiff in an action for damages may be permitted to "use the First Amendment simultaneously as a sword and a shield." . . .

Brief in Opposition to Cross-Petition for Writ of Certiorari at 13, filed in *Rhinehart v. Seattle Times*, 467 U.S. 1230 (1984) (citations omitted).

C. Nor Is the Decision Below In Conflict With Other Appellate Rulings.

Appellants' effort to manufacture the appearance of a conflict with other appellate courts also falls flat. J.S. at 15-16. No appellate decision has ever gone as far as appellants would apparently push this Court.

For example, appellants rely upon *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976), for the broad proposition that "disclosure of members is repugnant to the constitution." J.S. at 16. Appellants fail to inform

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[9] Nor should this Court credit appellants' suggestion that the "potential harm" is "greater to Aquarian Foundation than it was to the NAACP," because appellants feared that "the membership lists" would "reach the public record" through "a daily newspaper waiting to present the identity of members to every person in Seattle." J.S. at 15. In making this argument, appellants have chosen to ignore the 1981 protective order upheld by this Court in *Seattle Times*, which prohibited the newspaper from publishing the names and addresses of *any* Foundation members or donors obtained in discovery. *See Seattle Times*, 467 U.S. at 27 n.8.

the Court that in *Familias Unidas*, in sharp contrast to this case, the plaintiffs had dropped their claims for monetary relief, which "completely dissipated" any right to inquire into membership identity. *Id.* at 192. As the Fifth Circuit noted in a later ruling, the plaintiffs had eliminated "the need to answer the offensive interrogatories by amending their complaint to eliminate all class action and damage claims on behalf of the organization." *Familias Unidas v. Briscoe*, 619 F.2d 391, 397 (5th Cir. 1980).

Nor can appellants argue that a conflict exists because of cases such as *Church of Hakeem, Inc. v. Superior Court*, 110 Cal. App. 3d 384, 168 Cal. Rptr. 13 (1980), and *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979). J.S. at 15-16. Neither decision, as appellees have previously pointed out, deals with the circumstances of this case, where appellants are relying upon the allegedly privileged information in order to obtain a significant damage award. *See* Brief in Opposition to Cross-Petition for Writ of Certiorari at 16-18, filed in *Rhinehart v. Seattle Times*, 467 U.S. 1230 (1984).

Appellants also rely upon the nonexistent case of "*Britt v. Superior Court*, 20 Cal. App. 384, 168 Cal. Rptr. 695 (1978)." J.S. at 15. In fact, in *Britt v. Superior Court*, 20 Cal.3d 844, 858, 143 Cal. Rptr. 695, 703, 574 P.2d 766, 775 (1978), the California Supreme Court expressly refused to recognize an absolute privilege to refuse to disclose "information that relates to an issue which has been posited by the party claiming the privilege's protection." Thus, while it acknowledged a generalized constitutional privilege preventing "exposure of private associational affiliations and activities," the court held:

> When such associational activities are *directly relevant* to the plaintiff's claim, and disclosure of the plaintiff's affiliations is essential to the fair resolution of the lawsuit, a trial court may properly compel such disclosure.

20 Cal. 3d at 859, 143 Cal. Rptr. at 704, 574 P.2d at 775 (emphasis in original). Because the "plaintiffs' complaints do not relate to, nor put in issue, any aspect of their private associational conduct," the *Britt* court concluded "that plaintiffs have not waived the constitutional privacy interests at issue here." 20 Cal. 3d at 859-60, 143 Cal. Rptr. at 704-05, 574 P.2d at 776. In this case, where appellants' claimed damages are the loss of members and donors, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 23 n.2 (1984), the holding in *Britt* is easily harmonized with the decision below.

Appellants' unsupported assertion that "[t]he record is devoid of any showing . . . that there was prejudice to the defense in not obtaining a membership list" (J.S. at 17) is, to be blunt, completely unsupported by the record. Appellants, after all, premised their right to damages on allegations that individual members and donors were driven away from the Foundation by the allegedly defamatory publications. Denying appellees any right to inquire beyond the raw numbers supporting appellants' damage claims is clear prejudice. The Court of Appeals properly concluded pursuant to CR 37 of the Washington Civil Rules that appellees "have been prejudiced by the withholding of evidence relevant to the preparation of their defense." J.S. App. at 37.

II. APPELLANTS' EFFORT TO AVOID DISCLOSURE OF THE WALLA WALLA VIDEOTAPE OR OBTAIN A SECOND PROTECTIVE ORDER DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION.

Appellants claim a constitutional right to withhold production of a videotape depicting the 1978 performance that they conducted before 1,100 inmates at Walla Walla State Penitentiary—the very events that they themselves placed at issue in their defamation lawsuit. In 1986, when appellees sought discovery of the videotape, appellants declared this crucial evidence "sacred," refused to permit appellees to copy or view the videotape, and de-

manded a new protective order imposing onerous restrictions and conditions. J.S. App. at 29.

A. Again, the Court Below Properly Held That Appellants Could Not Invoke a Constitutional Privilege to Conceal Evidence of Events That They Had Placed at Issue by Their Lawsuit.

Appellants' claim that they are constitutionally exempt from producing the Walla Walla videotape was the subject of a prior unsuccessful appeal. In *Rhinehart v. KIRO, Inc.*, 44 Wash. App. 707, 723 P.2d 22 (1986), *review denied*, 108 Wash. 2d 1008, *appeal dismissed sub nom., Rhinehart v. Tribune Pub. Co.*, 108 S. Ct. 51 (1987), the court affirmed the dismissal of another one of appellants' defamation lawsuits because of their refusal to produce the Walla Walla videotape, holding that

> appellants are "attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information."

44 Wash. App. at 709, 723 P.2d at 24, *quoting Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 257-58, 654 P.2d 673, 691 (1982), *cert. denied*, 467 U.S. 1230 (1984).

The court below adopted this rationale and thus found "meritless the appellants' argument that their freedom to exercise religion was violated by the order compelling discovery of the tapes." J.S. App. at 31-32. While appellants decry its ruling as "paternalistic" and "nonsensical" (J.S. at 18-20), they have not offered a single decision that is inconsistent with the court's conclusion.[10] J.S. at 18-20.

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[10] Thus, as in the *KIRO* case, the record does not reflect any violation of the First Amendment's free exercise clause:

> The orders in issue here were permissible because they regulated what Appellants were required to do with their tapes if they wished to pursue their defamation claims and not what Appellants were allowed or were required to believe.

Appellees' Joint Motion to Dismiss at 11, filed in *Rhinehart v. Tribune Pub. Co.*, 108 S. Ct. 51 (1987).

B. Appellants' Argument That They Were Entitled to Issuance of a Second Protective Order Is At Odds With the Record and Inconsistent With This Court's Decision in Seattle Times.

Appellants insist that they were entitled to issuance of their proposed protective order in 1986 because "the trial court had found good cause for protection." J.S. at 20. The "good cause" that established appellants' right to their 1981 protective order, however, did not automatically entitle them to insist upon issuance of a different, and far more stringent, protective order in 1986. In fact, when he found "good cause" for entry of the 1981 protective order that was the subject of this Court's decision in *Seattle Times*, the trial judge rejected appellants' efforts to impose the additional limitations on the scope of discovery that they now claim were implicit in his decision to issue the 1981 order.[11]

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[11] In December 1980, appellants sought a protective order covering "all information" which defendants obtained in discovery. SCP 588-604, 1518-34. At that time, appellants knew that the Walla Walla videotape was a subject of discovery, because they had already acknowledged that the videotape was relevant to their case and had promised to provide a copy. SCP 217, 329. Their proposed December 1980 protective order, which specifically referenced videotapes and other documents, would have forbidden nonlitigation use of any such materials. SCP 596-97, 602-03, 1526-27, 1532-33. The trial court denied their motion. CP 152-67.

Appellants immediately moved for reconsideration, again arguing for a broad protective order restricting appellees' use of any documents obtained during discovery. SCP 766-82, 1555-71. Appellants requested that appellees be prohibited from disseminating any

> documents of any kind whether in writing or on tape (magnetic or otherwise) obtained from plaintiffs through discovery . . . and identified by the Aquarian Foundation as available only to its members.

SCP 1568. On June 21, 1981, the trial court rejected this request. SCP 1502-06.

Appellants again sought "to expand the protective order . . . to include materials relating to the internal organization of the

In 1986, after the case was remanded and their lawsuit was teetering on the brink of dismissal, appellants again moved for entry of a protective order that would have restricted or denied appellees access to the Walla Walla videotape but failed to present any evidence that the 1981 protective order (which by its terms covered "all of the discovery processes") was insufficient to prevent disclosure of members' identities, that the newspaper intended to broadcast or disseminate the videotape, or that any confidential information relating to individual Foundation members would be disclosed by viewing the videotape.[12] CP 345-83. The trial court concluded that appellants had failed to establish the "good cause" necessary for the issuance of a second protective order and the Court of Appeals found no abuse of discretion under the state's Civil Rules. CP 344; J.S. App. at 31.

The refusal to issue appellants' proposed protective order presents no substantial federal question. In *Seattle Times* this Court stated that there is "broad discretion" on the part of a "trial court to decide when a protective order is appropriate and what degree of protection is required" and held that "[t]he unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." *Seattle Times*, 467 U.S. at 36. The Court concluded that, in adjudicating federal constitutional questions relating to the issuance of such protective orders, "[i]t is sufficient" that the Washington courts found no abuse of discretion. *Id.* at 37.

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church, its philosophy, and teachings." SCP 1507-08. But on June 26, 1981, despite these repeated requests to broaden the order, the trial court issued the protective order that was the subject of *Seattle Times*, which restricted publication only of names and addresses and financial information. SCP 1513-14.

[12] The performance had, after all, taken place in front of 1,100 inmates and others at the Walla Walla State Penitentiary. *See* J.S. App. at 28.

III. THE DECISION TO AWARD ATTORNEYS' FEES AND EXPENSES AS A CONSEQUENCE OF APPELLANTS' FRIVOLOUS APPEAL DOES NOT VIOLATE ANY FEDERAL CONSTITUTIONAL RIGHT.

A. Appellants' Challenge to RCW 4.84.185 Is Irrelevant Because the Washington Statute Was Not at Issue in This Case.

Appellants claim that RCW 4.84.185, a Washington statute that enables judges to issue fee awards in frivolous lawsuits, violates their due process rights. J.S. at 21-27. They ask this Court to grant review because they say "there are no standards to predict when and whether the State court will enforce this statute." *Id.* at 27.

Appellants' attack is utterly misplaced. The statute has nothing to do with this case.[13] This Court is neither a "debating society" nor a forum "for the ventilation of public grievances." *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472, 473 (1982). Appellees did not rely upon RCW 4.84.185 when they requested an award of expenses and attorneys' fees as a result of appellants' frivolous appeal. Nor was the statute the basis of the Court of Appeals' conclusion that the appeal was frivolous and that appellees were entitled to their reasonable attorneys' fees. J.S. App. at 40-42.

B. In Any Event, Appellants' Due Process Arguments Are Not Supported by the Record.

1. *Appellants Received Ample Warning.*

Appellants' claim that they were denied "fair warning" (J.S. at 21) that they might be sanctioned for

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[13] In fact, RCW 4.84.185 was utilized by the trial judge in an entirely different Rhinehart defamation case, when she awarded The Seattle Times approximately $42,000 in attorneys' fees and expenses because the lawsuit was "frivolous and was advanced without reasonable cause" and was filed "to harass and to needlessly increase the cost of this litigation to defendants." *Rhinehart v. Seattle Times*, 15 Med. L. Rptr. 1509 (King County Super. Ct. 1988). Appellants' challenge to that fee award is now pending in the Washington Court of Appeals.

pursuing a frivolous appeal is at odds with the record. They were in fact provided with ample warning.

The Washington Supreme Court ruled against appellants' constitutional theory in 1982, stating that it had reviewed appellants' case authorities "and [found] none which supports the theory in the circumstances of this case." *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d at 258, 654 P.2d at 691. In 1986, when the Court of Appeals rejected appellants' second attempt to present their constitutional arguments, appellants narrowly avoided reimbursing their opponents for the "meritless" appeal, because "the instant case presented an appeal found to be without merit but not one that this court can deem frivolous or interposed to harass or for purposes of delay." *Rhinehart v. KIRO, Inc.*, 44 Wash. App. at 711, 723 P.2d at 25.

In January 1987, however, they offered the same stale arguments to Judge Dore, who concluded that their claims were "frivolous and in bad faith because this issue has already been decided against them in this lawsuit and in another lawsuit." CP 660. When appellants appealed Judge Dore's ruling, the warnings grew more explicit, with appellees repeatedly reminding appellants that the arguments they were advancing were utterly frivolous. While appellants apparently ignored these warnings, they cannot contend they were not given.

2. *Washington's Standards for Determining What Is a Frivolous Appeal Are Neither Vague Nor a "Hodge-Podge."*

In an apparent due process challenge, appellants suggest that frivolousness is "a vague, undeveloped concept" and that the case law defining what constitutes a frivolous appeal is nothing more than "a hodge-podge of somewhat unscientific criteria as to what is 'frivolity'." J.S. at 24. Appellants are mistaken.

Washington has developed clear, precise, and well-established standards for determining on a case-by-case

basis whether an appeal is frivolous. The standards are in fact quite stringent:

> In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Millers Casualty Ins. Co. v. Briggs, 100 Wash. 2d 9, 15, 665 P.2d 887, 891 (1983), *quoting Streater v. White*, 26 Wash. App. 430, 434-35, 613 P.2d 187, 191, *review denied*, 94 Wash. 2d 1014 (1980).

In its decision below, the Court of Appeals applied the *Millers Casualty* test in awarding appellees their reasonable attorneys' fees. The court also applied CR 11. J.S. App. at 40-42. The standards that the court applied were clear and unambiguous. Indeed, they are virtually indistinguishable from the standards adopted by other state and federal courts. J.S. at 24-26.

3. *Appellants Cannot Complain of Any Constitutional Violation, Having Been Afforded Several Opportunities to Present the Same Meritless Arguments.*

Appellants contend that the imposition of sanctions violates their due process right because their repetitive appeals are an attempt to press "novel" issues, "test the validity of established legal principles and seek the adoption of new legal propositions." J.S. at 25. They claim, therefore, that the power to award sanctions "will create

a chilling effect" preventing litigation by "particularly unpopular groups" and "affords an arbitrary arm to use in penalizing unpopular litigants." J.S. at 22, 28.

This argument might have had more appeal if appellants had suffered sanctions when they first presented their constitutional theories. Innovative and novel legal issues are one thing; repetitive and frivolous arguments are quite another. "One claim, which a court . . . may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact-finder to conclude that the . . . judicial processes have been abused." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

In fact, appellants have pressed their constitutional theories on the Washington courts (and this Court) in four separate appeals—the first involving the Seattle Times, the second KIRO, the third the Edwards and Barbieri law firm (which had represented them in their first appeal), and the fourth the Seattle Times again. They have also imposed themselves on the federal courts in Seattle and in the Ninth Circuit, causing one bankruptcy judge to complain that their "flagrant and intentional violation of the rules of discovery," which included Rinehart's appearance at his deposition dressed in a gorilla costume was designed to make a "mockery of the Court and of the judicial process." Findings of Fact and Conclusions of Law at 11, *Herr v. Aquarian Foundation, Inc.*, Adversary No. 80-0871 (Bankr. W.D. Wash. Feb. 28, 1984), *aff'd*, No. C84-496V (W.D. Wash. Sept. 7, 1984), *appeal dismissed*, No. 84-4369 (9th Cir. Oct. 11, 1985) (attached to Respondents' Answer to Motion for Reconsideration at Ex. H, filed July 22, 1988).

While appellants charge that they have become the victim of "a game of Russian roulette," J.S. at 27, they cannot justifiably complain, having pulled the trigger themselves on at least four prior occasions in defiance of court rulings. Given this sorry record, the decision to award sanctions was clearly not an abuse of discretion.

4. *State Courts Have the Inherent Authority to Adjudicate and, if Necessary, Impose Sanctions for Frivolous and Repetitive Constitutional Challenges.*

Appellants' claim that the *Millers Casualty* test improperly "penalizes the litigant who seeks a federal forum to assert federal rights" is premised upon a fundamentally mistaken assumption—that the state courts serve no purpose other than being passive conduits to this Court. J.S. at 28. State courts are not, however, simply doorkeepers to this Court. This Court has repeatedly acknowledged the competence of state courts to adjudicate federal constitutional claims. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 105 (1980).

The authority to entertain federal constitutional claims necessarily includes the inherent authority to impose sanctions that will deter frivolous federal constitutional claims. Given that Washington's courts have afforded appellants several opportunities to present the same constitutional arguments, that the state's courts have fairly adjudicated all of their federal claims, and that this Court has on three separate occasions refused to take review, appellants cannot seriously contend that they have been unduly hampered in their efforts to bring their theories to the attention of this Court.

C. Appellants Have Not Articulated Any Equal Protection Rights That Were Violated by the Court Below.

In concluding that appellants' appeal was frivolous, the Court of Appeals relied upon three Washington court rules. Two rules, CR 11 and RAP 18.7, impose obligations of good faith and reasonable investigation.[14] The other rule, RAP 18.9(a), permits an appellate court to

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[14] For example, RAP 18.7 imposes the duties of CR 11 upon appellate litigants and their counsel, while the language of CR 11 is identical to its federal counterpart, Fed. R. Civ. P. 11. *See* Apps. A, B, *infra*.

award damages in the event of a frivolous appeal.[15] The Rule imposes upon litigants and their counsel duties and obligations similar to those imposed by this Court.[16] While appellants would have the Court believe that the imposition of sanctions was a freakish accident, the fact is, as this Court has acknowledged, "unethical conduct in the setting of the adjudicatory process often results in sanctions." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. at 512.

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[15] *See* App. C, *infra*. An analogous rule has been adopted by the federal courts. *See* Fed. R. App. P. 38 ("[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee"). Federal statutes also provide for appropriate sanctions to deter frivolous litigation. *See* 28 U.S.C. § 1927 (providing that an attorney who "so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct"); 28 U.S.C. § 2103 (where an appeal is improvidently taken and is to be treated as a petition for writ of certiorari and "there appears to be no reasonable ground for granting a petition for writ of certiorari," the Court may adjudge to the respondent "reasonable damages . . . and single or double costs").

[16] Thus, appellants' statement that "[f]rivolity has not been previously reviewed by this court," J.S. at 25, 28, is not well taken. Rule 49.2 provides that "[w]hen an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages." The Rule has been in place since 1803. *See Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1070 n.7 (1985) (Stevens, J., concurring). The decisions of this Court have demonstrated that monetary sanctions are often necessary to discourage frivolous and repetitive appeals. *See, e.g., In re McDonald*, 57 U.S.L.W. 3545 (1989) (per curiam); *Tatum v. Regents of the University of Nebraska-Lincoln*, 462 U.S. 1117 (1983); *Bohn v. Bohn*, 316 U.S. 646, 647 (1942) (per curiam); *Mississippi Central R.R. Co.* v. *Smith*, 299 U.S. 518 (1936); *Roe v. Kansas*, 278 U.S. 191, 193 (1929); *Slaker v. O'Connor*, 278 U.S. 188, 191 (1929); *Wagner Electric Mfg. Co.* v. *Lyndon*, 262 U.S. 226, 233-34 (1923); *Southern Ry. Co. v. Gadd*, 233 U.S. 572, 581 (1914); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 110 (1912). *See also* Sup. Ct. R. 50.7 (providing that "[i]n an appropriate instance, the Court may adjudge double costs").

1. *Distinctions Between Frivolous and Nonfrivolous Appeals Do Not Violate the Equal Protection Clause.*

Appellants argue that in finding that their appeal was frivolous the Court of Appeals violated their right of equal protection under the Fourteenth Amendment, apparently because they "challenge the status quo," because they are "unpopular," or because they are viewed differently from "more traditional litigants." J.S. at 27-28. However phrased, appellants' equal protection argument is utterly without merit.

Washington has a policy of deterring frivolous appeals. Pursuant to that policy, Washington appellate courts are empowered to award compensatory sanctions when they find an appeal is frivolous. The classification in question distinguishes between frivolous and nonfrivolous appeals. Absent a suspect class or a fundamental right (which, contrary to appellants' suggestions, are not involved here),[17] a classification is presumed constitutional under the equal protection clause if it is " 'rationally related to a legitimate state interest.' " *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1652 (1988), *quoting Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

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[17] Appellants' assertion that the Court of Appeals violated their First Amendment rights because it treated them "less favorably than other cases . . . filed by nonreligious groups" is without foundation. J.S. at 27. Indeed, their case is virtually indistinguishable from *Camer v. Seattle School District No. 1*, 52 Wash. App. 531, 540, 762 P.2d 356, 361-62 (1988), in which the court ruled an appeal by secular litigants frivolous because the "case presents essentially the same claims and issues on which the Camers were defeated in two prior appeals" and "the Camers have persisted in appealing this case even though they present no debatable issues and their position is so devoid of merit that there is no possibility of reversal." Nor can appellants claim that, by exercising its fee-shifting authority, the court violated their First Amendment right to pursue litigation. As this Court has held, abuse of process is not freedom of expression. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

Clearly, judicial resources are not inexhaustible. *See In re McDonald*, 57 U.S.L.W. 3545, 3546 (1989) (per curiam) ("Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources."). A state has an obvious interest in deterring frivolous appeals, which simply consume the time and energy of its appellate judges to the exclusion of more significant and compelling cases. *See Bankers Life*, 108 S. Ct. at 1653 ("The Constitution does not forbid Mississippi from singling out a group of litigants that it rationally concludes is most likely to be deterred from bringing meritless claims at the least cost to the State."). Intermediate appellate courts such as the Washington Court of Appeals, which have no discretion in determinnig which final judgments they will review, must of necessity rely upon rules such as RAP 18.7, CR 11, and RAP 18.9(a) to avoid being swamped by frivolous appeals.

Furthermore, the state's goal in deterring frivolous appeals is directly related to the classification in question. An appeal that cannot satisfy the five-part test in *Millers Casualty, supra*, is an appeal that by definition is completely devoid of merit. Because only the most meritless cases will fail to pass the test, appellants' equal protection attack is unfounded.[18]

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[18] Indeed, the classification scheme at issue here is far more precise and rational than the Mississippi statute at issue in *Bankers Life*, which allegedly promoted the state's interest in discouraging frivolous appeals by imposing an automatic penalty of 15 percent of the judgment amount against every unsuccessful appellant, regardless of the merits of the appeal. *See Bankers Life*, 108 S. Ct. at 1651-54. If, as the Court concluded, the Mississippi scheme did not offend the Fourteenth Amendment's guarantee of equal protection because it was "reasonably related to the State's objectives of discouraging frivolous appeals, compensating appellees for the intangible costs of litigation, and conserving judicial resources," *id.* at 1654, then *a fortiori* the stricter, narrower classification at issue here is constitutional.

2. *The Question Whether Sanctions May Be Awarded For The Assertion of Frivolous State Law Theories Is Neither Substantial Nor A Federal Question.*

Appellants also seek review by this Court of the standards utilized by state courts in determining when an argument based upon state law is frivolous. Thus, they argue that the Court of Appeals violated their rights under the United States Constitution when it concluded that their *state law* arguments concerning the scope and interpretation of the Washington priest-penitent privilege statute, RCW 5.60.060(3), were frivolous. J.A. at 27-28.

Adoption of their theory would represent an unprecedented and bizarre expansion of federal judicial power, by turning every state law claim into a potential federal constitutional issue—at least those state law claims that are sufficiently meritless to be deemed frivolous by the state courts. The result would be a topsy-turvy jurisprudence that would transform the flotsam and jetsam of state jurisprudence into federal questions and sweep the most abusive litigants, with the most insubstantial and meritless state law causes of action, onto this Court's docket.[19]

D. Appellants Failed to Assert Their Federal Constitutional Arguments on a Timely Basis.

Appellants did not timely raise the constitutional claims that they seek to bring to this Court. Therefore,

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[19] As a result, this Court would also be forced to endure the same tedious and disspiriting abuses that led the state courts to conclude that sanctions were appropriate. For example, appellants represent to this Court that their appeal involves the interpretation of the state's priest-penitent statute, a provision "that had never before been interpreted by the Appeals Court." J.S. at 28. In fact, in August 1986, appellants' peculiar interpretation of the Washington priest-penitent statute was rejected as "without merit" by the Court of Appeals in a wholly different case involving these same appellants. Jurisdictional Statement at 39, filed in *Aquarian Foundation v. Law Offices of Edwards & Barbieri*, 108 S. Ct. 222 (1987), *rehearing denied*, 108 S. Ct. 1065 (1988).

this Court should decline this appeal. *See Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

In their briefing to the Court of Appeals, appellees argued that they were entitled to appropriate sanctions because the appeal was frivolous. In their response, appellants ignored these arguments and did not argue that any federal constitutional provision precluded such relief.

Indeed, appellants' federal claim surfaced only on a motion for motion for reconsideration after the Court of Appeals rendered its decision. Even then, their argument amounted to nothing more than a "vague appeal to constitutional principles." *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. at 1651. Although appellants claimed that the court's decision violated their "rights to equal protection," they did not specify the source of these rights. The Washington constitution, like its federal counterpart, prohibits a denial of equal protection. *Petersen v. Washington*, 100 Wash. 2d 421, 443-46, 671 P.2d 230, 245-46 (1983) (applying Wash. Const. Art. I, § 12). Appellants, therefore, did not raise a federal claim in their motion for reconsideration. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68 (1928); *New York Central & Hudson River R.R. Co. v. New York*, 186 U.S. 269, 273 (1902).

When they sought review with the Washington Supreme Court, appellants argued that the determination that their appeal was frivolous violated their "due process rights." Assuming this objection was timely, it was still insufficient. *Washington v. Davis*, 38 Wash. App. 600, 604-06, 686 P.2d 1143, 1145-46 (1984) (applying Wash. Const. Art. I, § 3). Appellants thus did not assert a federal claim. *See Bowe v. Scott*, 233 U.S. 658, 664-65 (1914). Finally, although appellants suggested that the Court of Appeals decision violated their right to "freedom of speech" allegedly contained in the Seventh Amendment, and their Sixth Amendment "constitutional right of ac-

cess to the courts," neither suggestion raised a proper federal claim.[20]

CONCLUSION

For the reasons stated above, this Court should dismiss the appeal or, in the alternative, treat the papers whereon the appeal was taken as a petition for writ of certiorari and deny certiorari.

Respectfully submitted,

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[20] For one thing, the Seventh Amendment to the United States Constitution (which has never been applied to the states) does not protect freedom of speech. *See* U.S. Const. Amend. VII. For another, the Sixth Amendment by its terms refers only to criminal prosecutions. *See* U.S. Const. Amend. VI.

APPENDICES

APPENDIX A

Washington Rule of Appellate Procedure ("RAP") 18.7:

RULE 18.7. SIGNING AND DATING PAPERS

Each paper filed pursuant to these rules should be dated and signed by an attorney or party as provided in CR 11, except papers prepared by a judge, commissioner or clerk of court, bonds, papers comprising a record on review, papers which are verified on oath or by certificate and exhibits.

APPENDIX B

Washington Civil Rule ("CR") 11:

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS

Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign and date his pleading, motion, or legal memorandum and state his address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by him that he has read the pleading, motion, or legal memorandum; that to the best of his knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violatin of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropri-

ate sanction, which may include an order to pay to the other party or partieos the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

APPENDIX C

Washington Rule of Appellate Procedure ("RAP") 18.9(a):

RULE 18.9 VIOLATION OF RULES

(a) *Sanctions.* The appellate court on its own initiative or on motion of a party may order a party or counsel who uses these rules for the purpose of delay or who fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.